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SIXTH CIRCUIT

PATTERN CRIMINAL

JURY INSTRUCTIONS

1991 EDITION

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JUDICIAL COUNCIL OF THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

RESOLUTION

Resolved, that the Committee on Pattern Jury Instructions of the District Judges Association of the Sixth Circuit is hereby commended for its work in producing pattern jury instructions for use in criminal cases. The Council expresses its appreciation to the judges and members of the bar who served on the Committee and to the Committee's reporters for their dedicated service.

Resolved, further, that the Committee on Pattern Jury Instructions of the District Judges Association of the Sixth Circuit is authorized to distribute to the District Judges of the Circuit for their aid and assistance the Committee's Pattern Jury Instructions, and that the Administrative Office of the United States Courts is requested to publish and reproduce those Instructions for that purpose; provided, however, that this Resolution shall not be construed as an adjudicative approval of the content of such instructions which must await a case-by-case review by the Court of Appeals.

FOR THE JUDICIAL COUNCIL

Gilbert S. Merritt
Chief Judge

October 3, 1990

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INTRODUCTION

These instructions were drafted by the Pattern Criminal Jury Instruction Committee of the Sixth Circuit District Judges Association. The Committee included judges, prosecutors, defense attorneys and academics from around the circuit, and was assisted by a separate group of judges, prosecutors and defense attorneys who served as reactors and reviewed each instruction.

Our four main goals in drafting the instructions were to promote uniformity, to assist busy judges and practitioners, to reduce litigation and to state the law in an understandable way. We have generally followed the drafting suggestions in Appendix A to the Federal Judicial Center Pattern Criminal Jury Instructions, and we have relied on Garner, A Dictionary of Modern Legal Usage (1987), to resolve disputes over grammar and style.

As the Judicial Council indicated in its resolution authorizing the distribution of these instructions, the content of jury instructions depends on the facts of the particular case. Each case is different, and no pattern instructions can adequately cover all the variables that may arise. For this reason, these instructions are not binding. They are suggested instructions only, to be used as a guide, and are not meant to be mechanically recited without modifications. See United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (pattern instructions should not be used "without careful consideration being given to their applicability to the facts and theories of the specific case being tried"). Counsel and the court must work to tailor the instructions to fit the facts of each case.

These instructions are designed for use at the end of trial. But

this should not be interpreted as a recommendation against using preliminary instructions before trial begins. To the contrary, the Committee strongly believes that preliminary instructions increase juror comprehension and understanding. With minor modifications, these instructions can be used as preliminary instructions.

We have arranged the instructions sequentially in one possible order of presentation. Following the lead of the Federal Judicial Center, most of the instructions use singular pronouns and verbs, and use masculine pronouns only where the use of gender-neutral language proved awkward or cumbersome, or lacked sufficient concreteness and specificity. Like the Judicial Center, we recommend that the pronouns and verbs be tailored to the facts of each case.

We debated the question of just how concrete and specific the instructions should be. As noted by the Judicial Center, research indicates that instructions that are concrete and specific are easier to understand than those that are couched in general terms and that rely on the jurors to apply the general terms to the facts of the case. See Federal Judicial Center Instructions, Appendix A, Suggestion 7. For example, using the defendant's name rather than "the defendant" and a particular witness's name instead of "the witness" makes the instructions easier to follow. But we were also concerned that, especially in complicated cases, this degree of specificity might impose an onerous burden on trial judges, and might result in inadvertent mistakes that in turn would lead to appellate issues. Thus, we recommend that the instructions be tailored as concretely as practicable given the nature of the case. We have used brackets [ ] to identify language that is only appropriate in limited circumstances. Use notes at the end of the instructions briefly

explain when bracketed language should be used, and also highlight other matters relating to the instructions.

The Committee commentaries, drafted by our reporters, explain the applicable law and the Committee's reasoning, and often include a more detailed explanation of the matters covered in the use notes. Where decisions from the United States Supreme Court or the Sixth Circuit provided clear guidance, we generally limited our discussion to those decisions, and did not attempt to survey cases from other circuits. We limited the subsequent history of each case we cited to Supreme Court action, such as certiorari denied, and subsequent decisions that related to the point for which the case was cited. The commentaries obviously are not precedent, and should not be treated as such. They include cases released through March 1, 1991, and should be updated as necessary.

The absence of an instruction does not mean that the Committee deliberately decided against including the instruction. Where we did make such a decision, we specifically said so and explained why. See for example Instruction 2.07 on specific intent.

Procedurally, Fed. R. Crim. P. 30 states that the court "may instruct the jury before or after the arguments are completed or at both times." When the instructions are given before arguments, some modification of language and verb tense will be necessary. See for example Instruction 1.02(3) dealing with lawyer arguments about the law.

In Allen v. United States, 921 F.2d 78, 80 (6th Cir. 1990), the Sixth Circuit held that using a magistrate to read instructions prepared by the district court did not require reversal, at least where the court told the jury that the court had prepared the instructions

and the defendant did not object to this procedure. Whether written instructions should be given to the jury is a matter that rests within the court's sound discretion. E.g., United States v. Henry, 878 F.2d 937 (6th Cir. 1989).

In closing, it is appropriate to note that the district court is vested with "broad discretion" in formulating its charge. United States v. English, 925 F.2d 154, 158 (6th Cir. 1991). A new trial based on alleged deficiencies in the instructions should not be granted unless "the instructions, taken as a whole, are misleading or give an inadequate understanding of the law." Id.

ACKNOWLEDGEMENTS

This project was funded by the Administrative Office of the United States Courts, the Michigan, Ohio, Tennessee and Kentucky State Bar Foundations and the Detroit Federal Bar Association. We greatly appreciate their support. In addition, we would like to thank the Thomas M. Cooley Law School and Ohio Northern University Law School for their generous contribution of research, secretarial and photocopying assistance.

We would also like to acknowledge the judges, prosecutors and defense attorneys who contributed their time to serve as our reactors. Our thanks to District Judges Julia S. Gibbons (W.D. Tenn.), Jacob Herman Weber (S.D. Ohio), Eugene E. Siler, Jr. (E.D. Ky.), John T. Nixon (M.D. Tenn.), Henry R. Wilhoit, Jr. (E.D. Ky.), Anna Diggs Taylor (E.D. Mich.), William K. Thomas (N.D. Ohio), and Benjamin F. Gibson (W.D. Mich), and to Patricia G. Blake, David F. DuMouchel, William H. Farmer, Vincent E. Wehby, Gerald Messerman, Arnold Morelli, James Zerhusen, Aubrey B. Harwell, Jr., and Harry P. Hellings, Jr.

Many individuals and groups submitted helpful comments and suggestions when the instructions were circulated in draft form. We would especially like to thank Circuit Judge Ralph B. Guy, Jr., District Judge R. Allan Edgar (E.D. Tenn.), Susan W. Brenner, Gregory Lockhart and Laura Sanom of the Dayton Federal Bar Association, Joseph M. Whittle of the United States Attorneys Office for the Western District of Kentucky, and Joyce J. George, Ann C. Rowland, J. Matthew Cain and Gary D. Arbeznik of the United States Attorneys Office for the Northern District of Ohio.

Several individuals made significant contributions to the project

in other ways. Our thanks to Maura Corrigan, Paul Borman, Jim Higgins and Paul Marcus, and a special thanks to Pat Funni and Kay Lockett for their administrative assistance.

Finally, we would like to acknowledge our debt to the authors of all the other pattern federal instructions that came before us, whose work provided the foundation that we built on.

CITATIONS TO OTHER PATTERN INSTRUCTIONS

We have abbreviated our citations to other pattern instructions as follows:

Fifth Circuit Instruction ____	Pattern Jury Instructions, Criminal Cases, Fifth Circuit District Judges Association Pattern Jury Instruction Committee (1990)
Seventh Circuit Instruction ____	Federal Criminal Jury Instructions of the Seventh Circuit (1980)
Eighth Circuit Instruction ____	Manual of Model Criminal Jury Instructions for the Eighth Circuit (1989)
Ninth Circuit Instruction ____	Manual of Model Criminal Jury Instructions for the Ninth Circuit (1989)
Eleventh Circuit Instruction ____	Pattern Jury Instructions, Criminal Cases, Eleventh Circuit District Judges Association Pattern Jury Instruction Committee (1985)
Federal Judicial Center Instruction ____	Pattern Criminal Jury Instructions, Federal Judicial Center Study Committee (1988)
Devitt and Blackmar Instruction ____	E. Devitt & C. Blackmar, Federal Jury Practice & Instructions (3rd Edition 1977)

Saltzburg and Perlman Instruction ____	S. Saltzburg and H. Perlman, Federal Criminal Jury Instructions (1985)
Sand and Siffert Instruction ____	L. Sand, J. Siffert, W. Loughlin & S. Reiss, Modern Federal Jury Instructions (1990)
D.C. Bar Instruction ____	Criminal Jury Instructions, District of Columbia Bar Association (3rd Edition)

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Chapter 1.00

General Principles

1.01

Introduction

(1) Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.

(2) I will start by explaining your duties and the general rules that apply in every criminal case.

(3) Then I will explain the elements, or parts, of the crime that the defendant is accused of committing.

[(4) Then I will explain the defendant's position.]

(5) Then I will explain some rules that you must use in evaluating particular testimony and evidence.

(6) And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

(7) Please listen very carefully to everything I say.

USE NOTE: Bracketed paragraph (4) should be included only when the defendant has raised a defense that requires some explanation, like alibi, entrapment, insanity, duress or self-defense, or when a defense theory instruction will be given.

COMMITTEE COMMENTARY 1.01

This instruction is designed to give the jurors an outline of the instructions that follow. The Committee believes that the jurors will follow the instructions better if they are provided with explanatory introductions and transitions.

The general organization of the jury instructions is a matter within the trial court's discretion. United States v. Dunn, 805 F.2d 1275, 1283 (6th Cir. 1986). The Committee suggests that instructions about case specific evidentiary matters such as impeachment by prior convictions, expert testimony and the like should be given after the instructions defining the elements of the crime, not before as other circuits have suggested. The Committee's rationale is that the jurors should be told what the government must prove before they are told how special evidentiary rules may affect their determination. This is the approach suggested by Devitt and Blackmar, Federal Jury Practice and Instructions (3d ed). By suggesting this approach, the Committee does not intend to foreclose other approaches, or to suggest that the choice of one approach over the other should give rise to an appellate issue.

Paragraph (4) of this instruction is bracketed to indicate that it should not be used in every case. It should be included only when the defendant has raised a defense that requies some explanation, like alibi, entrapment, insanity, duress or self-defense, or when a defense theory instruction will be given.

1.02

Jurors' Duties

(1) You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

(2) Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

[(3) The lawyers have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls.]

(4) Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

USE NOTE: Bracketed paragraph (3) should be included only when the lawyers have talked about the law during their arguments. If the instructions are given before closing arguments, the language of this paragraph should be modified accordingly.

COMMITTEE COMMENTARY 1.02

The jurors have two main duties. First, they must determine from the evidence what the facts are. Second, they must take the law stated in the court's instructions, apply it to the facts and decide whether the facts prove the charge beyond a reasonable doubt. See Sparf v. United States, 156 U.S. 51, 102-107, 15 S. Ct. 273, 39 L. Ed. 343 (1895); Starr v. United States, 153 U.S. 614-625, 14 S. Ct. 919, 38 L. Ed. 841 (l894).

The jurors have the power to ignore the court's instructions and bring in a not guilty verdict contrary to the law and the facts. Horning v. District of Columbia, 254 U.S. 135, 138, 41 S. Ct. 53, 65 L. Ed. 185 (l920). But they should not be told by the court that they have this power. United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir.), cert. denied, 488 U.S. 832 (1988); United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983), cert. denied, 466 U.S. 905 (1984); United States v. Burkhart, 50l F.2d 993, 996-997 (6th Cir. 1974), cert. denied, 420 U.S. 946 (1975). They should instead be told that it is their duty to accept and apply the law as given to them by the court. United States v. Avery, supra at 1027.

The language in paragraph (3) regarding what the lawyers may have said about the law is bracketed to indicate that it should not be used in every case. It should be included only when the lawyers have talked about the law during the trial. When the instructions are given before closing arguments, the language of this paragraph should be modified accordingly.

Devitt and Blackmar Instruction 11.01 concludes with the concept that the jurors should "seek the truth as to the facts" from the

evidence presented. See also Devitt and Blackmar Instruction 18.01 ("Your sole interest is to seek the truth from the evidence in the case"). In United States v. Lawson, 780 F.2d 535, 545 (6th Cir. 1985), the Sixth Circuit reviewed an analogous instruction and rejected the defendant's argument that it required reversal of his conviction. However, other circuits have condemned instructions telling jurors that their basic job is to determine which witnesses are telling the truth. See for example United States v. Pine, 609 F.2d 106, 107-108 (3rd Cir. 1979), and cases collected therein. Such instructions improperly invite the jury to simply choose between competing versions of the facts, rather than to decide whether the government has carried its burden of proving guilt beyond a reasonable doubt.

1.03

Presumption of Innocence

Burden of Proof

Reasonable Doubt

(1) As you know, the defendant has pleaded not guilty to the crime charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crime he is accused of committing. It does not even raise any suspicion of guilt.

(2) Instead, the defendant starts the trial with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that he is guilty.

(3) This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden

stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

(4) The government must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

(5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved the defendant guilty

beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

USE NOTE: Paragraph (3) should be modified when an affirmative defense like insanity is raised, which, by statute, the defendant has the burden of proving. It should be changed to explain that while the government has the burden of proving the elements of the crime, the defendant has the burden of proving the defense.

COMMITTEE COMMENTARY 1.03

The presumption of innocence is the "bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), quoting Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (l895). Although the Due Process Clause does not necessarily require an instruction on the presumption in state criminal trials, Kentucky v. Warton, 441 U.S. 786, 789, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979), in federal trials the Supreme Court appears to have exercised its supervisory authority to require an instruction, at least upon request.

In Coffin v. United States, supra, the defendant appealed his federal conviction on the ground that the trial court had refused to give any instruction on the presumption of innocence. The government countered that no instruction was necessary because the trial court gave a complete instruction on the necessity of proof beyond a reasonable doubt. Id. at 452-453. The Supreme Court reversed, holding that "the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime." Id. at 460. Accord Cochran v. United States, 157 U.S. 286, 298-300, 15 S. Ct. 628, 39 L. Ed. 704 (1894) ("[C]ounsel asked for a specific instruction upon the defendant's presumption of innocence, and we think it should have been given . . . . The Coffin case is conclusive . . . and [requires] that the judgment . . . be [r]eversed.").

More recently, in Taylor v. Kentucky, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978), Justice Stevens, joined by Justice

Rehnquist, dissented from the Court's holding that the failure of a state court to instruct on the presumption violated due process. In doing so, however, Justice Stevens carefully distinguished between state and federal trials, and unequivocally stated:

> "In a federal court it is reversible error to refuse a request for a proper instruction on the presumption of innocence." Id. at 491.

The Sixth Circuit has not directly addressed this question. But in strong dictum one panel has said:

> "Jury instructions concerning the presumption of innocence and proof beyond a reasonable doubt are fundamental rights possessed by every citizen charged with a crime in these United States." United States v. Hill, 738 F.2d 152, 153 (6th Cir. 1984).

The Supreme Court has provided some general guidance about what an instruction on the presumption of innocence should say, but without mandating any particular language. The Court has said that the presumption of innocence is not evidence. Nor is it a true presumption in the sense of an inference drawn from other facts in evidence. Instead, it is "an 'assumption' that is indulged in the absence of contrary evidence." Taylor v. Kentucky, supra, 436 U.S. at 483-484 n. 12. It is a "shorthand description of the right of the accused to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion." Id. Its main purpose is to "purge" any suspicions the jurors may have arising from "official suspicion, indictment [or] continued custody," and to emphasize to the jurors that their decision must be based "solely on the . . . evidence introduced at trial." Id. at 484-486.

Although not necessarily approving the particular language of the defendant's requested instruction in Taylor, the Supreme Court did

quote language from that instruction which told the jurors that although accused, the defendant began the trial with "a clean slate," and that the jurors could consider "nothing but legal evidence" in support of the charge. The Court then said that this language appeared "well suited to forestalling the jury's consideration of extraneous matters, that is, to perform the purging function described . . . above." Id. at 488 n. 16.

Subsequent Supreme Court cases have repeated that the purpose of the presumption is to purge jurors' suspicions arising from extraneous matters, and to admonish them to decide the case solely on the evidence produced at trial. Carter v. Kentucky, 450 U.S. 288, 302 n. 19, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981); Bell v. Wolfish, 441 U.S. 520, 533, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Sixth Circuit decisions echo this general view. See Whiteside v. Parke, 705 F.2d 869, 871 (6th Cir.) ("the presumption . . . protect[s] a defendant's constitutional right . . . to be judged solely on the evidence presented at trial"), cert. denied, 464 U.S. 843 (1983). Instruction 1.04 defines what is and is not evidence, and contains a strong admonition that the jurors must base their decision only on the evidence produced at trial.

With regard to the indictment, instructions telling the jury that "the indictment itself is not evidence of guilt" have been characterized by the Sixth Circuit as "a correct principle of criminal law." Garner v. United States, 244 F.2d 575, 576 (6th Cir.), cert. denied, 355 U.S. 832 (1957). Similarly, instructions stating that "the purpose of an indictment is only to cause the person named therein to be brought to trial and to advise him of the nature of the charge or charges against him" have been characterized as "desirable" and "customary." United States v. Baker, 418 F.2d 851, 853 (6th Cir.

1969), cert. denied 397 U.S. 1015 (1970). And in Hammond v. Brown, 323 F. Supp. 326, 342 (N. D. Ohio 1971), aff'd 450 F.2d 480 6th Cir. 1971), the district court characterized as "the law" the principle that "an indictment is merely an accusation of crime, and . . . is neither evidence of guilt nor does it permit an inference of guilt."

With regard to the presumption itself, several Sixth Circuit cases dealing with the extent to which a district judge must voir dire prospective jurors shed some further light on what the instructions should say. In United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973), the Sixth Circuit reversed the defendant's conviction based on the district court's refusal to ask whether the jurors could accept the legal principle that "a defendant is presumed to be innocent, has no burden to establish his innocence, and is clothed throughout the trial with the presumption." Similarly, in United States v. Hill, 738 F.2d 152, 154 (6th Cir. 1984), the Sixth Circuit said that a challenge for cause would have to be sustained if a juror indicated that he could not accept the proposition that "a defendant is presumed to be innocent despite the fact that he has been accused in an indictment." And in Hammond v. Brown, supra, 323 F. Supp. at 342, the district court characterized as an "essential [voir dire] question" whether the jurors could accept the principle that "a man is presumed innocent unless and until he is proved guilty by evidence beyond a reasonable doubt."

Two decisions have identified language that should not be used. In Williams v. Abshire, 544 F. Supp. 315, 319 (E.D. Mich. 1982), aff'd 709 F.2d 1512 (6th Cir. 1983), a state court included in its instructions language that the presumption "doesn't mean necessarily that he is innocent, but you are duty bound to give him that presumption," and language that "[n]ow we know that some defendants are

not innocent of course." Although the district court denied the defendant's habeas petition, it characterized this language as "open to criticism." In Lurding v. United States, 179 F.2d 419, 422 (6th Cir. 1950), the Sixth Circuit characterized as "inept phrasing" language that a defendant is presumed innocent "until such time as the proof produced by the government establishes . . . guilt." The court expressed the fear that such language might be misinterpreted to mean that guilt is established at the conclusion of the government's proofs, unless the defendant proves otherwise.

The Due Process Clause requires that the government bear the burden of proving every element of the crime charged beyond a reasonable doubt. In Re Winship, supra, 397 U.S. at 364. This means that the prosecution must present evidence sufficient to overcome the presumption of innocence and convince the jurors of the defendant's guilt. Agnew v. United States, 165 U.S. 36, 50-51, 17 S. Ct. 235, 41 L. Ed. 624 (1896); Coffin v United States, supra, 156 U.S. at 458-459. "The defendant is presumed to be innocent . . . until he is proven guilty by the evidence. . . . This presumption remains with the defendant until [the jurors] are satisfied of [his] guilt beyond a reasonable doubt." Agnew v. United States, supra, 165 U.S. at 51.

Early Supreme Court cases contained broad statements that the burden of proof rests on the government throughout the trial, and that the burden is never on the accused to prove his innocence. E.g., Davis v. United States, 160 U.S. 469, 487, 16 S. Ct. 353, 40 L. Ed. 499 (1895). Later cases have tempered these statements to the extent of recognizing that the Due Process Clause does not forbid placing the burden of proving an affirmative defense on the defendant. Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267; Patterson v.

New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); Rivera v. Delaware, 429 U.S. 877, 97 S. Ct. 226, 50 L. Ed. 2d 160 (1976). See for example 18 U.S.C. §17(b) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence.") When a true affirmative defense like insanity is raised, paragraph (3) must be modified to explain that while the prosecution has the burden of proving the elements of the crime, the defendant has the burden of proving the affirmative defense.

Some instructions recommended by Sixth Circuit decisions include language that the burden of proof "never shifts" to the defendant. E.g., United States v. Hart, 640 F.2d 856, 860 n. 3 (6th Cir.), cert. denied 451 U.S. 992 (1981). The Seventh Circuit has criticized this language as "a legal concept foreign to most laymen which might only confuse jurors and detract from the main thrust of the instruction that the burden of proof lies with the government." See Seventh Circuit Instruction 2.06 and Committee Comment. None of the five circuits that have drafted pattern instructions have included this language. Nor has the Federal Judicial Center. Paragraph (3) attempts to avoid this problem by simply stating that the burden is on the prosecution "from start to finish."

Some early United States Supreme Court cases appeared to indicate that the government's burden of proof included the burden of negating every reasonable theory consistent with the defendant's innocence. For example, in Hopt v. Utah, 120 U.S. 430, 7 S. Ct. 614, 30 L. Ed. 708 (1887), the Supreme Court rejected the defendant's argument that the district court's instructions failed to adequately define the term reasonable doubt, in part on the ground that the district court had told the jurors that if they could reconcile the evidence with any

reasonable hypothesis consistent with innocence, they should do so and find the defendant not guilty. The Supreme Court then added that "[t]he evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion." Id. at 441.

Subsequently, however, even in cases based largely on circumstantial evidence, the Supreme Court has specifically rejected the argument that the government's burden includes the affirmative duty to exclude every reasonable hypothesis except that of the defendant's guilt. Holland v. United States, 348 U.S. 121, 139-140, 75 S. Ct. 127, 99 L. Ed. 150 (1954). Accord Jackson v. Virginia, 443 U.S. 307, 326, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("[T]he Court has rejected [this theory] in the past [citing Holland] [and] [w]e decline to adopt it today.") The "better rule" is that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." Holland, supra, 348 U.S. at 139-140. "If the jury is convinced beyond a reasonable doubt, we can require no more." Id. at 140.

Although some earlier Sixth Circuit cases appeared to require the government to disprove every reasonable hypothesis except that of guilt, see, e.g., United States v. Campion, 560 F.2d 751, 754 (6th Cir. 1977); United States v. Wages, 458 F.2d 1270, 1271 (6th Cir. 1972), a long line of more recent cases has consistently rejected any such requirement. E.g., United States v. Reed, 821 F.2d 322, 325 (6th Cir. 1987); United States, v. Townsend, 796 F.2d 158, 161 (6th Cir. 1986); United States v. Vannerson, 786 F.2d 221, 225 (6th Cir.), cert. denied, 476 U.S. 1123 (1986); Maupin v. Smith, 785 F.2d 135, 140 (6th Cir.

1986); United States v. Stone, 748 F.2d 361, 362-363 (6th Cir. 1984), cert. denied, _____ U.S. _____, 111 S.Ct 71, 112 L.Ed.2d 45 (1990).

Devitt and Blackmar Instruction 11.14 on Burden of Proof and Reasonable Doubt concludes with the statement that "[i]f the jury views the evidence . . . as reasonably permitting either of two conclusions--one of innocence, the other of guilt--the jury should of course adopt the conclusion of innocence." The Ninth Circuit has disapproved this kind of instruction, characterizing it as "one of innumerable variations of the theme that circumstantial evidence must exclude every hypothesis but that of guilt." United States v. Sukumolachan, 610 F.2d 685, 688 (9th Cir. 1980). In United States v. Cooper, 577 F.2d 1079, 1085 (6th Cir.), cert. denied, 439 U.S. 868 (1978), the Sixth Circuit reviewed a defense request for a similar instruction, and rejected the defendant's argument that the instruction should have been given. The Sixth Circuit stated that such an instruction "poses a likelihood of needless confusion and . . . closely resembles [the] one expressly rejected by the Supreme Court [in Holland]." Based on these cases, Instruction 1.03 omits this concept altogether.

One other Sixth Circuit decision has identified some potentially troublesome language. In United States v. Buffa, 527 F.2d 1164 (6th Cir. 1975), cert. denied, 425 U.S. 936 (1976), the district court instructed, without objection, that although it was necessary for the government to prove every element of the crime charged beyond a reasonable doubt, it was not necessary that each "subsidiary fact" be proved beyond a reasonable doubt. The district court did not define the term "subsidiary fact." Although affirming on the ground that this was not plain error, the Sixth Circuit characterized this as "opening

up the possibility that the jury [would be] misled or confused." Id. at 1165.

The reasonable doubt standard represents "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, supra, 397 U.S. at 372 (Harlan, J., concurring). Accord Francis v. Franklin, 471 U.S. 307, 313, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). The purpose of the reasonable doubt standard is to reduce the risk of an erroneous conviction:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." In re Winship, supra at 364.

Despite repeated characterizations of the reasonable doubt standard as "vital", "indispensable" and "fundamental," see Winship, supra at 363-364; Jackson v. Virginia, supra, 443 US at 317, the Supreme Court has been ambivalent about whether and to what extent the term "reasonable doubt" should be defined. On the one hand, the Court has stated on three occasions that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Holland v. United States, supra, 348 U.S. at 140; Dunbar v. United States, 156 U.S. 185, 199, 15 S. Ct. 325, 39 L. Ed. 390 (1894); Miles v. United States, 103 U.S. 304, 312; 26 L. Ed. 481 (l880). On the other hand, the Court has said that "in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just

comprehension." Hopt v. Utah, supra, 120 U.S. at 440. And in several other cases, the Court has quoted some rather lengthy explanations of the term without criticism. See for example Wilson v. United States, 232 U.S. 563, 569-570, 34 S. Ct. 347, 58 L. Ed. 728 (1913); Holt v. United States, 218 U.S. 245, 254, 31 S. Ct. 2, 54 L. Ed. 1021 (1910); Agnew v. United States, supra, 165 U.S. at 51.

Some Sixth Circuit decisions have sustained state criminal convictions against constitutional attacks based on the trial court's failure to define the term reasonable doubt. See Whiteside v. Parke, supra, 705 F.2d at 870-873. Other Sixth Circuit decisions have noted in dicta the Supreme Court's statement that attempts to define reasonable doubt do not usually make the term more understandable. See United States v. Releford, 352 F.2d 36, 41 (6th Cir. 1965), cert. denied, 382 U.S. 984 (1966). But no Sixth Circuit decisions reviewing federal criminal convictions have explicitly discouraged or condemned instructions defining reasonable doubt, as some other circuits have done. See United States v. Ricks, 882 F.2d 885, 894 (4th Cir. 1989), cert. denied, ____ U.S. ____, 110 S. Ct. 846, 107 L. Ed. 2d 841 (1990), United States v. Marquardt, 786 F.2d 771, 784 (7th Cir. 1986). See also United States v. Nolasco, 926 F.2d 869 (9th Cir. 1991) (en banc) (the decision whether to define reasonable doubt should be left to the trial court's sound discretion), and United States v. Olmstead, 832 F.2d 642, 646 (lst Cir. 1987) (an instruction that uses the words reasonable doubt without further defining them is adequate), cert. denied, 486 U.S. 1009 (1988).

Instead, Sixth Circuit decisions have rather consistently proceeded on the assumption that some definition should be given, with the only real question being what the definition should say. See for

example United States v. Mars, 551 F.2d 711, 716 (6th Cir. 1977); United States v. Christy, 444 F.2d 448, 450 (6th Cir.), cert. denied, 404 U.S. 949 (1971); Ashe v. United States, 288 F.2d 725, 730 (6th Cir. 1961). And in United States v. Hart, supra, 640 F.2d at 860-861 (6th Cir. 1981), the Sixth Circuit recommended two rather lengthy definitions as "much better" than the shorter instruction given by the district court.

Supreme Court decisions provide a substantial amount of guidance on what instructions on reasonable doubt should say, some of it rather detailed. The Court has said that proof beyond a reasonable doubt does not mean proof to an "absolute certainty" or proof beyond all "possible" doubt. Hopt v. Utah, supra, 120 U.S. at 439-440. "[S]peculative minds may in almost every . . . case suggest possibilities of the truth being different from that established by the most convincing proof . . . [but] [t]he jurors are not to be led away by speculative notions as to such possibilities." Id. at 440.

In dictum, the Supreme Court has described the state of mind the jurors must reach as "a subjective state of near certitude." Jackson v. Virginia, supra, 443 U.S. at 315. Accord Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972); In re Winship, supra, 397 U.S. at 364.

The Supreme Court has approved the concept that a reasonable doubt is "one based on reason," Jackson v. Virginia, supra, 443 U.S. at 317, and has noted with apparent approval that numerous cases have defined a reasonable doubt as one "based on reason which arises from the evidence or lack of evidence." Johnson v. Louisiana, supra, 406 U.S. at 360. The Court has also approved the analogy that a reasonable doubt is one that would cause reasonable persons to "hesitate to act"

in matters of importance in their personal lives. Holland v. United States, supra, 348 U.S. at 121, 140, citing Bishop v. United States, 107 F.2d 297, 303 (D. C. Cir. 1939). Accord Hopt v. Utah, supra, 120 U.S. at 441.

The Supreme Court has also disapproved or cast doubt on several concepts. In Hopt v. Utah, supra at 440, the Court said that "the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt' [and] may require explanation as much as the other." In Cage v. Louisiana, 498 U.S. ___, 111 S. Ct. 328, 329-330, 112 L. Ed. 2d 339, 342 (1990) (per curiam), the Court held that instructions defining a reasonable doubt as "an actual substantial doubt" and as one that would give rise to a "grave uncertainty" were reversibly erroneous. See also Taylor v. Kentucky, supra, 436 U.S. at 488, where the Court quoted the trial court's instruction defining a reasonable doubt as "a substantial doubt, a real doubt," and then said "[t]his definition, though perhaps not in itself reversible error, often has been criticized as confusing." In Holland v. United States, supra, 348 U.S. at 140, the Court said that the language "hesitate to act" should be used instead of the language "willing to act upon." And in Harris v. Rivera, 454 U.S. 339, 347, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981), the Court indicated that a reasonable doubt may exist even if the factfinder cannot articulate the reasons on which the doubt is based.

Sixth Circuit decisions provide further guidance. Although not necessarily condemning the "willing to act" language as reversible error, Sixth Circuit cases have expressed a preference for the "hesitate to act" language, see United States v. Mars, supra, 551 F.2d at 716, or for equivalent language combining the two concepts to state

that proof beyond a reasonable doubt is "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." United States v. Hart, supra, 640 F.2d at 860 n. 3.

In the context of reviewing state court convictions, the Sixth Circuit has upheld against constitutional attacks instructions like those criticized by the Supreme Court in Taylor v. Kentucky, supra, 436 U.S. at 488, which define a reasonable doubt as "a substantial doubt, a real doubt." Payne v. Smith, 667 F.2d 541, 547 (6th Cir. 1981), cert. denied, 456 U.S. 932 (1982); Hudson v. Sowders, 510 F. Supp. 124, 128 (W.D. Ky. 1981), aff'd, 698 F.2d 1220 (6th Cir. 1982). But in the context of reviewing federal convictions, use of the term "substantial doubt" has been characterized as "unfortunate" and as potentially presenting "an issue of some magnitude." United States v. Christy, supra, 444 F.2d at 450.

The Sixth Circuit has also criticized language suggesting that the jurors must be "convinced" that a reasonable doubt exists in order to acquit, Cutshall v. United States, 252 F.2d 677, 679 (6th Cir. 1958) (potentially burden shifting), and language stating that if the jurors believe the government's evidence, then the defendant is guilty. Lurding v. United States, 179 F.2d 419, 422 (6th Cir. 1950) ("unfortunate phrasing").

In United States v. Hawkins, Unpublished Disposition No. 86-1646 (6th Cir. July 14, 1987), the district court instructed that proof beyond a reasonable doubt is proof that leaves the jurors "firmly convinced" of the defendant's guilt. The Sixth Circuit held that this was not plain error, and stated that two other circuits had upheld use of this language as "a valid reasonable doubt instruction," citing

United States v. Hunt, 794 F.2d 1095, 1100-1101 (5th Cir. 1986), and United States v. Bustillo, 789 F.2d 1364, 1368 (9th Cir. 1986) in support. But these two cases are much more limited than this statement implies. In Hunt, all the Fifth Circuit said was that the "firmly convinced" language seemed little different than "a real doubt," a definition which earlier Fifth Circuit decisions had approved. And in Bustillo, all the Ninth Circuit did was to hold that the "firmly convinced" language was not plain error.

With regard to the concept that a reasonable doubt may be based on either the evidence or a lack of evidence, see Johnson v. Louisiana, supra, 406 U.S. at 360, the Sixth Circuit has refused to reverse based on the failure to specifically include the words "want of evidence" in a reasonable doubt definition, noting that when read as a whole, the instructions made clear that a reasonable doubt could arise from a lack of evidence. Ashe v. United States, 288 F.2d 725, 730 (6th Cir. 1961).

In United States v. Hart, supra, 640 F.2d at 859-861, the Sixth Circuit reviewed the following district court instruction:

> "You have heard a lot about reasonable doubt. Reasonable doubt is a doubt founded in reason, and arising from the evidence. Not a mere hesitation of the mind to pronounce guilt because of the punishment that may follow. The punishment, if any, is for the Court. Not a mere capricious doubt or hesitancy of the mind to say this man did so and so, but it must be a doubt founded in reason and arising from the evidence, and you can't go outside the evidence that you have heard and seen in this case to make any kind of determination." Id. at 859.

Although the Sixth Circuit ultimately decided that this instruction did not require reversal, it said that "we think . . . it would have been much better if the district judge had given the charge offered by either the defense or the government." Id. at 860. The

Sixth Circuit then went on to say that "[b]oth of those instructions (which are similar) provide a much better definition of reasonable doubt than the instruction actually given and also define more clearly the government's burden of proving absence of reasonable doubt." Id. at 860-861. The instruction offered by the defense in Hart stated:

> "The indictment or formal charge against a defendant is not evidence of guilt. The defendant is at present presumed innocent. The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.
>
> It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is doubt based upon a reason and common sense--the kind of doubt that would make a reasonable person hesitate to act.
>
> It exists as a real doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.
>
> The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.
>
> So if the jury, after careful and impartial consideration of all the evidence in the case, is left with a reasonable doubt that a defendant is guilty of the charge, it must acquit." Id. at 860 n. 3.

The instruction offered by the government in Hart stated:

> "The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins trial with a "clean slate"--with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after

> careful and impartial consideration of all the evidence in the case.
>
> It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense--the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.
>
> The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.
>
> The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.
>
> So, if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions--one of innocence, the other of guilt--the jury should of course adopt the conclusion of innocence." Id. at 860 n. 3.

Most other pattern instructions agree that the jurors should be told about the effect of the government's failure to prove guilt beyond a reasonable doubt. But there is some disagreement over the language that should be used. The majority of pattern instructions state that the jury "must" find the defendant not guilty, or that it is "your duty" to do so. See Fifth Circuit Instruction 1.06, Eighth Circuit Instruction 3.09, Ninth Circuit Instruction 3.03, Eleventh Circuit Basic Instructions 2.1 and 2.2, and Federal Judicial Center Instruction 21. This is in accord with the instructions offered by both the defense and the prosecution in United States v. Hart, supra, 640 F.2d at 860 n. 3. The Seventh Circuit stands alone in recommending language

saying that the jury "should" find the defendant not guilty. See Seventh Circuit Instruction 6.0l.

There is more disagreement over whether, and to what extent, the jurors should be told about the effect of the government successfully proving guilt beyond a reasonable doubt. Neither of the instructions offered by the parties in Hart mentioned this subject at all. Seventh Circuit Instruction 6.01 states that the jury "should" find the defendant guilty. Fifth Circuit Instruction 1.06 and Eleventh Circuit Basic Instruction 3 state that "If you are convinced that the [defendant] has been proved guilty beyond a reasonable doubt, say so." Ninth Circuit Instruction 3.03 states that it is "your duty" to find the defendant guilty. Federal Judicial Center Instruction 21 states that "you must find [the defendant] guilty." And Eighth Circuit Instruction 3.09 does not specifically address this concept at all.

As previously explained in the Commentary to Instruction 1.02, even though jurors have the power to acquit despite the existence of evidence proving guilt beyond a reasonable doubt, Sixth Circuit decisions clearly hold that the court's instructions should not tell the jurors about this. See United States v. Avery 717 F.2d 1020, 1027 (6th Cir. 1983), cert. denied, 466 U.S. 905 (1984); United States v. Burkhart, 501 F.2d 993, 996-997 (6th Cir. 1974), cert. denied, 420 U.S. 946 (1975). "The law of jury nullification . . . seems not to require or permit a judge to tell the jury that it has the right to ignore the law." Burkhart, supra at 997 n. 3. Instructions like Seventh Circuit Instruction 6.01 stating only that the jurors "should" find the defendant guilty if the government has proven guilt beyond a reasonable doubt may imply that the jurors have a choice, and implicitly invite

juror nullification, contrary to the spirit, if not the letter of the above authorities.

In the absence of any definitive Sixth Circuit authority, Instruction 1.03 takes a middle course by adopting the "say so" approach recommended by the Fifth and Eleventh Circuits.

1.04

Evidence Defined

(1) You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

(2) The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; the stipulations that the lawyers agreed to; and the facts that I have judicially noticed.

(3) Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

(4) During the trial I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or

I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

(5) Make your decision based only on the evidence, as I have defined it here, and nothing else.

USE NOTE: Paragraph (2) should be tailored to delete any references to kinds of evidence not relevant to the particular trial. If the court has taken judicial notice of a fact, Instruction 7.19 should be given later in the instructions.

Paragraph (4) should also be tailored depending on what has happened during the trial.

COMMITTEE COMMENTARY 1.04

It is settled practice to give a general instruction defining what is and is not evidence. See Fifth Circuit Instruction 1.07, Seventh Circuit Instruction 1.07, Eighth Circuit Instruction 3.03, Ninth Circuit Instructions 3.04 and 3.05, Eleventh Circuit Basic Instructions 4.l and 4.2 and Federal Judicial Center Instructions l and 9.

In some cases, there may not be any stipulations, or any judicially noticed facts. In such cases, paragraph (2) should be tailored to eliminate the unnecessary and irrelevant language.

The strongly worded admonition in paragraph (4) regarding proffered evidence that was rejected or stricken is based in part on Federal Judicial Center Instructions l and 9, and in part on the idea that a strongly worded admonition is necessary to counteract the jurors' natural curiosity and inclination to speculate about these matters. This paragraph should be tailored to fit the particular facts of the case. If, for example, there was no occasion during the course of the trial to order that things the jurors saw or heard be stricken from the record, the language in this paragraph dealing with such matters should be omitted.

Devitt and Blackmar Instruction ll.ll includes the concept that the evidence includes testimony and exhibits "regardless of who may have called [or produced] them." The Ninth Circuit has incorporated this concept into its general instruction on evidence. See Ninth Circuit Instruction 3.04. None of the other four circuits that have drafted pattern instructions have included this concept. Nor has the Federal Judicial Center Instructions. Instruction 1.04 simply states

that evidence includes "what the witnesses said while they were testifying under oath."

1.05

Consideration of Evidence

(1) You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

COMMITTEE COMMENTARY 1.05

Supreme Court and Sixth Circuit cases indicate that jurors should consider the evidence in light of their own experiences, may give it whatever weight they believe it deserves and may draw inferences from the evidence. See Turner v. United States, 396 U.S. 398, 406-407, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970) (the jury may consider its own store of knowledge, must assess for itself the probative force and the weight, if any, to be accorded the evidence, and is the sole judge of the facts and the inferences to be drawn therefrom); Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954) (the jury must use its experience with people and events in weighing the probabilities); United States v. Jones, 580 F.2d 219, 222 (6th Cir. 1978) (the jury may properly rely upon its own knowledge and experience in evaluating evidence and drawing inferences).

The original draft of this instruction ended with a reminder that proof beyond a reasonable doubt was required to convict. The purpose of this reminder was to make sure the jurors understand that although they may draw conclusions from the facts, those conclusions, together with the other evidence in the case, must be sufficiently compelling to prove guilt beyond a reasonable doubt. The Committee decided to delete this reminder as unnecessary given the repeated references to the requirement of proof beyond a reasonable doubt in Instruction 1.03.

1.06

Direct and Circumstantial Evidence

(1) Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

(2) Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

(3) Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

(4) It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence,

both direct and circumstantial, and give it whatever weight you believe it deserves.

COMMITTEE COMMENTARY 1.06

In Holland v United States, 348 U.S. 121, 139-140, 75 S. Ct. 127, 99 L. Ed. 150 (1954), the Supreme Court held that circumstantial evidence is no different intrinsically than direct evidence. Accord United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990). See also Jackson v. Virginia, 443 U.S. 307, 326, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979) (no special cautionary instruction should be given on the government's burden of proof in circumstantial cases).

The purpose of this instruction is to define direct and circumstantial evidence, to make clear that the jury should consider both kinds of evidence, and to dispel the television notion that circumstantial evidence is inherently unreliable. Four of the five circuits that have drafted pattern instructions include a definition of direct and circumstantial evidence, and explain that the law makes no distinction between the two. See Fifth Circuit Instruction 1.08 Alternative B, Seventh Circuit Instruction 3.02, Ninth Circuit Instruction 3.06 and Eleventh Circuit Basic Instructions 4.1 and 4.2. Eighth Circuit Instruction 1.03 does not define the two, but does include the concept that the law makes no distinction between them.

Federal Judicial Center Instructions 1 and 9 take the position that there is no need to define direct and circumstantial evidence because there is no difference legally in the weight to be given the two. The Committee rejected this approach on the ground that jurors need to be told that they can rely on circumstantial evidence, and that to intelligently convey this concept, some definition of circumstantial evidence is required.

Some Sixth Circuit decisions indicate that upon request, a defendant is entitled to an instruction that the jury may acquit him on the basis of circumstantial evidence. See United States v. Eddings, 478 F.2d 67, 72-73 (6th Cir. 1973).

1.07

Credibility of Witnesses

(1) Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

(2) Let me suggest some things for you to consider in evaluating each witness's testimony.

(A) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

(B) Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

(C) Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

(D) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

(E) Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

[(F) Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something [or failed to say or do something] at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.]

(G) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony

supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

(3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

USE NOTE: Bracketed paragraph (2)(F) should be included when a witness has testified inconsistently, or has said or done something at some other time that is inconsistent with the witness's testimony. It should be tailored to the particular kind of inconsistency (i.e. either inconsistent testimony on the stand, or inconsistent out-of-court statements or conduct, or both). The bracketed failure to act language should be included when appropriate.

COMMITTEE COMMENTARY 1.07

The "Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses." United States v. Bailey, 444 U.S. 394, 414, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980). "It is for them, generally, and not for . . . [the] courts, to say [whether] a particular witness spoke the truth." Id. at 414-415.

This instruction differs from other pattern instructions in two ways. First, it includes a more extensive explanation of the concept that the jurors, not the judge, decide questions of witness credibility. Given the importance of the jury's role in assessing credibility, and the natural inclination of jurors to be influenced by the judge, the Committee believes that a more extensive explanation is both necessary and appropriate.

Second, this instruction includes a more extensive explanation of the factors the jurors may consider in assessing credibility. Most other pattern instructions briefly list the factors without explanation. The danger of that approach is that the factors will go by the jurors too quickly to be retained and absorbed. Although brevity ordinarily is a virtue, this is one area where a few extra words are worth the cost. Assessing credibility is the sine qua non of the jury's function, making a more extensive explanation of these factors justified.

Most other pattern instructions provide at least some guidance about how to deal with inconsistent testimony, statements or conduct by a witness. See Fifth Circuit Instruction 1.11, Eighth Circuit

Instruction 1.05, Ninth Circuit Instruction 3.07 and Eleventh Circuit Basic Instruction 6.1. See also D.C. Bar Instruction 2.11, Devitt and Blackmar Instruction 17.01 and Saltzburg and Perlman Instruction 3.04. Based on this, the Committee decided to include bracketed paragraph (2)(F), for those cases in which a witness has testified inconsistently, or has said or done something at some other time that is inconsistent with the witness's testimony.

Seventh Circuit Instruction 1.02 and Ninth Circuit Instruction 3.07 both include a bracketed admonition that the defendant's testimony should be judged in the same manner as that of any other witness. None of the other sources the Committee surveyed include this kind of admonition in their general instruction on witness credibility. Instruction 7.02B addresses this subject in a separate instruction.

In United States v. Bryan, 591 F.2d 1161, 1163 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980), the Fifth Circuit held that telling the jurors to consider the extent to which each witness's testimony was supported or contradicted by other evidence did not shift the burden of proof to the defendant. On the other hand, so-called "presumption of truthfulness" instructions, which tell the jurors that each witness is presumed to speak the truth unless the evidence indicates otherwise, are reversibly erroneous. See, e.g., United States v. Maselli, 534 F.2d 1197, 1202-1203 (6th Cir. 1976).

1.08

Number of Witnesses

(1) One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

(2) Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

USE NOTE: Use caution in giving this instruction when the defense has not presented any testimony. It may draw potentially prejudicial attention to the absence of defense witnesses.

COMMITTEE COMMENTARY 1.08

Most of the other circuits that have drafted pattern instructions have included some explanation about what effect the jurors should give to the number of witnesses who testified on each side. See Fifth Circuit Instruction 1.09, Seventh Circuit Instruction 3.28, Ninth Circuit Instruction 3.07 and Eleventh Circuit Basic Instruction 5. A similar consensus exists among the other sources the Committee surveyed. See Federal Judicial Center Instruction 23, D.C. Bar Instruction 2.13, Devitt and Blackmar Instruction 17.20 and Saltzburg and Perlman Instruction 3.04.

In United States v. Moss, 756 F.2d 329, 334-335 (4th Cir. 1985), the defendant objected to the district court's number of witnesses instruction on the ground that it drew unnecessary and potentially prejudicial attention to the fact that the defense had not presented any witnesses during the trial. On appeal, the Fourth Circuit held that there was no error, but stated that district courts should refrain from giving such an instruction when the defendant has not presented any witnesses. Cf. Barnes v. United States, 313 A.2d 106, 110 (D.C. App. 1973) (such an instruction is not required, even upon request by the defense, when the defense has elected not to present any witnesses).

1.09

Lawyers' Objections

(1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.

(2) The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

(3) And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

COMMITTEE COMMENTARY 1.09

This proposed instruction covers several concepts related to lawyers' objections that are commonly included somewhere in the court's instructions. See Seventh Circuit Instruction 1.05, Ninth Circuit Instruction 1.06, Devitt and Blackmar Instruction 10.13, Sand and Siffert Instruction 2-8 and Federal Judicial Center Instruction 9.

Chapter 2.00

Defining The Crime
And Related Matters

2.01

Introduction

(1) That concludes the part of my instructions explaining your duties and the general rules that apply in every criminal case. In a moment, I will explain the elements of the crime that the defendant is accused of committing.

(2) But before I do that, I want to emphasize that the defendant is only on trial for the particular crime charged in the indictment [and the lesser charges that I will explain to you]. Your job is limited to deciding whether the government has proved the crime charged [or one of those lesser charges].

[(3) Also keep in mind that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has

proved this defendant guilty. Do not let the possible guilt of others influence your decision in any way.]

USE NOTE: Any changes made in paragraphs (2) and (3) should be made in paragraphs (1) and (2) of Instruction 8.08 as well.

Bracketed paragraph (3) should be included only if the possible guilt of others has been raised during the trial. Modifications of this paragraph may be necessary in conspiracy, aiding and abetting, alibi or mistaken identification cases, where the possible guilt of others may be a legitimate issue.

COMMITTEE COMMENTARY 2.01

See generally Fifth Circuit Instruction 1.20, Eleventh Circuit Basic Instruction 10.1, Federal Judicial Center Instruction 20, Devitt and Blackmar Instructions 11.04 and 11.06, Saltzburg and Perlman Instruction 3.56 and Sand and Siffert Instructions 2-18 and 3-3.

Paragraph (3) of this instruction is bracketed to indicate that it should not be given in every case. If the possible guilt of others has not been raised during trail, this paragraph is unnecessary and should be omitted to avoid confusion. Note also that this paragraph may require modification in cases where vicarious criminal liability is alleged, such as conspiracy or aiding and abetting cases. In such cases, the jury may legitimately be required to decide the guilt of other persons not charged in the indictment.

Paragraph (3) may also require modification in cases where the defendant has raised an alibi defense, or has argued mistaken identification. Where the defendant claims that someone else committed the crime, it may be confusing to instruct the jurors that they should not be concerned with anyone else's guilt.

The concepts covered in paragraphs (2) and (3) are covered again for emphasis in Instruction 8.08. Any deletions or modifications made in this instruction should be made in paragraphs (1) and (2) of Instruction 8.08 as well.

2.01A

Separate Consideration--Single Defendant

Charged With Multiple Crimes

(1) The defendant has been charged with several crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. It is your duty to separately consider the evidence that relates to each charge, and to return a separate verdict for each one. For each charge, you must decide whether the government has presented proof beyond a reasonable doubt that the defendant is guilty of that particular charge.

(2) Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any of the other charges.

USE NOTE: Paragraph (2) should be modified when guilt of one charge is a prerequisite for conviction of another charge, as in R.I.C.O. cases involving predicate offenses.

COMMITTEE COMMENTARY 2.01A

This instruction is modeled after Federal Judicial Center Instruction 46A, and Saltzburg and Perlman Instruction 1.04B. See also Fifth Circuit Instruction 1.22, Seventh Circuit Instruction 7.03, Ninth Circuit Instruction 3.09 and Eleventh Circuit Basic Instruction 10.2.

The last sentence of this instruction should be modified when guilt of one charge is a prerequisite for conviction of another charge. See for example 18 U.S.C. §1961 (R.I.C.O. conviction requires proof of two predicate offenses).

2.01B

Separate Consideration--Multiple Defendants

Charged With a Single Crime

(1) The defendants have all been charged with one crime. But in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant, and to return a separate verdict for each one of them. For each defendant, you must decide whether the government has presented evidence proving that particular defendant guilty beyond a reasonable doubt.

(2) Your decision on one defendant, whether it is guilty or not guilty, should not influence your decision on any of the other defendants.

COMMITTEE COMMENTARY 2.01B

In United States v. Mayes, 512 F.2d 637, 641 (6th Cir.), cert. denied, 422 U.S. 1008 (1975), the Sixth Circuit quoted with approval Justice Rutledge's admonition in Kotteakos v. United States, 328 U.S. 750, 772, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946):

> "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation."

The proposed instruction is based on these principles, and on the instructions given by the district court in United States v. United States Gypsum Co., 550 F.2d 115, 127-128 n. 12 (3rd Cir. 1977), which were subsequently affirmed by the Supreme Court in United States v. United States Gypsum Co., 438 U.S. 422, 462-463, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). See also Fifth Circuit Instruction 1.23, Ninth Circuit Instruction 3.10, Eleventh Circuit Basic Instruction 10.3 and Federal Judicial Center Instruction 46B.

2.01C

Separate Consideration--Multiple Defendants

Charged With the Same Crimes

(1) The defendants have all been charged with several crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. And in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant on each charge, and to return a separate verdict for each one of them. For each one, you must decide whether the government has presented proof beyond a reasonable doubt that a particular defendant is guilty of a particular charge.

(2) Your decision on any one defendant or charge, whether it is guilty or not guilty, should not influence your decision on any of the other defendants or charges.

USE NOTE: Paragraph (2) should be modified when guilt of one charge is a prerequisite for conviction of another charge, as in R.I.C.O. cases involving predicate offenses.

COMMITTEE COMMENTARY 2.01C

This instruction combines the concepts contained in Instructions 2.01A and 2.01B. See the Committee Commentaries for those instructions for further explanation. It is designed for use in cases where the indictment charges multiple defendants with the same crimes.

The last sentence of paragraph (2) should be modified when guilt of one charge is a prerequisite for conviction of another charge. See for example 18 U.S.C. §1961 (R.I.C.O. conviction requires proof of two predicate offenses).

2.01D

Separate Consideration--Multiple Defendants

Charged With Different Crimes

(1) The defendants have been charged with different crimes. I will explain to you in more detail shortly which defendants have been charged with which crimes. But before I do that, I want to emphasize several things.

(2) The number of charges is no evidence of guilt, and this should not influence your decision in any way. And in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant on each charge, and to return a separate verdict for each one of them. For each one, you must decide whether the government has presented proof beyond a reasonable doubt that a particular defendant is guilty of a particular charge.

(3) Your decision on any one defendant or one charge, whether it is guilty or not guilty, should not influence your decision on any of the other defendants or charges.

USE NOTE: Paragraph (3) should be modified when guilt of one charge is a prerequisite for conviction of another charge, as in R.I.C.O. cases involving predicate offenses.

COMMITTEE COMMENTARY 2.01D

This instruction combines the various concepts contained in Instructions 2.01A and 2.01B. See the Committee Commentaries for those instructions for further explanation. It is designed for use in cases where the indictment charges multiple defendants with different crimes.

The last sentence of paragraph (3) should be modified when guilt of one charge is a prerequisite for conviction of another charge. See for example 18 U.S.C. §1961 (R.I.C.O. conviction requires proof of two predicate offenses).

2.02

Definition of the Crime

(1) Count _____ of the indictment accuses the defendant of _____ in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant (fully define the prohibited acts and/or results required to convict).

(B) Second, that the defendant did so (fully define the precise mental state required to convict).

[(C) Third, that (fully define any other elements required to convict).]

[(2) Insert applicable definitions of terms used here.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

[(4) Insert applicable explanations of any matters not required to convict here.]

USE NOTE: See the Committee Commentaries to Instructions 2.05 and 2.06 for definitions of the precise mental state required for various federal criminal offenses.

Bracketed paragraph (1)(C) should be included when the crime cannot be broken down neatly into two elements. Additional paragraphs should be added as needed to cover all the elements.

Bracketed paragraph (2) should be included when terms used in paragraphs (1)(A-C) require further explanation.

Bracketed paragraph (4) should be included when it would be helpful to explain matters that need not be proved in order to convict. When used, a final sentence should be included for balance emphasizing what it is that the government must prove to convict.

COMMITTEE COMMENTARY 2.02

The Committee does not recommend that the trial judge read the indictment to the jury. The content of an indictment is determined by what a valid charging document requires. As a result, it may contain legal jargon not easily understandable by lay jurors. It may also include statements or allegations that are not necessarily material to a particular defendant's guilt or innocence. For these reasons, this instruction does not recommend reading the indictment. But the Committee takes no position on the practice in some districts of providing the jury with a copy of the indictment.

Some pattern instructions suggest that the district court paraphrase the material allegations in the indictment in language that is understandable by lay jurors. But paraphrasing the indictment puts an added burden on the district court, creates the potential for appellate litigation if a material allegation is erroneously translated or overlooked, and is unnecessary because the elements of the crime will be defined elsewhere in the instructions. And whatever weight might be given to the argument that the jury inferentially should be told that a grand jury has found sufficient evidence to indict is countered by the long settled rule that the indictment is not evidence of guilt. E.g., Garner v. United States, 244 F.2d 575, 576-577 (6th Cir.), cert. denied, 355 U.S. 832 (1957). For these reasons, the Committee similarly does not recommend paraphrasing the indictment.

Some pattern instructions recommend that the district court read the material parts of the statute the defendant is charged with violating. But like indictments, statutes may contain legal jargon not easily understandable by lay jurors, and often they are drafted broadly

to cover a number of ways in which a given offense may be committed, some or most of which may not be material in a particular case. Reading or paraphrasing the statute thus suffers from problems similar to those involved in reading or paraphrasing the indictment. See United States v. Morrow, 923 F.2d 427, 434 (6th Cir. 1991) (trial judge's responsibility goes beyond merely reading or reiterating the pertinent statute). This instruction therefore does not recommend reading or paraphrasing the applicable statute.

Some pattern instructions recommend that the district court provide the jury with the citation to the particular United States Code provision the defendant is charged with violating. The apparent reason for this is to impress the jury with the fact that what the defendant is charged with is a crime. But it is questionable whether the numerical citation is necessary to achieve this purpose. For this reason, this instruction does not recommend that the numerical citation be included. Instead, the instruction simply tells the jury that federal law makes what the defendant is accused of a crime.

Whether and to what extent instructions defining the offense charged should repeat concepts like the presumption of innocence, the government's burden of proof and reasonable doubt is a matter of some dispute. Some pattern instructions repeat all three of these concepts in their offense definition instructions. See for example Saltzburg and Perlman Instructions 3.58A and 32.01. Most omit reference to the presumption of innocence, but at least mention the government's burden of proof beyond a reasonable doubt. See for example Fifth Circuit Instruction 2.24, Seventh Circuit Instruction 6.01, Federal Judicial Center Instruction 65, Devitt and Blackmar Instruction 13.04, and Sand and Siffert Instruction 3-10. The Committee recommends this latter

approach.

There is also some dispute over whether the offense definition instruction should explicitly explain that if the government fails to prove any one of the required elements, then the jury's verdict must be not guilty. A majority of pattern instructions do not explicitly explain this in their offense definition instructions. See for example Fifth Circuit Instruction 2.24, Eighth Circuit Instruction 6.18.471, Ninth Circuit Instruction 8.06A, Eleventh Circuit Offense Instruction 5, Federal Judicial Center Instruction 65 and Devitt and Blackmar Instruction 13.04. A respectable minority, however, do. See Seventh Circuit Instruction 6.01, Saltzburg and Perlman Instruction 32.01, Sand and Siffert Instruction 3-10 and D.C. Bar Instruction 4.00. The Committee recommends the latter approach because this is an important concept that should not be left to inference.

This instruction recommends a suggested format for defining the elements of the crime which breaks the definition down into two basic parts--the prohibited acts and/or results required to convict; and the required mental state. This is a common format. See for example Eleventh Circuit Offense Instruction 5 and Federal Judicial Center Instruction 65. Obviously, it is impossible to break every federal crime down into two neatly separate elements, and this instruction should not be viewed as a rigid formula that can or should be rotely followed in every case. A bracketed catch-all paragraph (1)(C) is included to illustrate that other elements may be required to convict.

In addition to defining these concepts, the instruction must make clear that the defendant had the required mental state <u>at the time</u> he committed the prohibited acts or achieved the prohibited results, not afterwards. In cases where this is a contested issue, the court may

wish to expand on the "did so" language in paragraph (1)(B).

Many crimes are defined by reference to legal terms that may require further explanation. This instruction suggests that applicable definitions of any such terms be inserted in bracketed paragraph (2).

For some crimes, it may be helpful to explain that there are certain matters that the government need not prove in order to convict. For example, counterfeiting requires an intent to defraud, but does not require proof that anyone was actually defrauded. This instruction suggests that any such explanation be inserted in bracketed paragraph (4). When used, a final sentence should be included for balance emphasizing what it is that the government must prove in order to convict.

2.03

Definition of Lesser Offense

(1) If you find the defendant not guilty of _____ [or if after making every reasonable effort to reach a unanimous verdict on that charge, you find that you cannot agree], then you must go on to consider whether the government has proved the lesser charge of _____.

(2) The difference between these two crimes is that to convict the defendant of the lesser charge of _____, the government does not have to prove _____. This is an element of the greater charge, but not the lesser charge.

(3) For you to find the defendant guilty of the lesser charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant <u>(fully define the prohibited acts and/or results required to convict)</u>.

(B) Second, that he did so ___ (fully define the mental state required to convict) __.

[(C) Third, that ___ (fully define any other elements required to convict) __.]

[(4) Insert applicable definitions of terms used here.]

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

[(6) Insert applicable explanations of any matters not required to convict here.]

USE NOTE: The bracketed language in paragraph (1) should be added if the court believes that the jurors should be permitted to consider a lesser offense even though they have not unanimously acquitted the defendant of the charged offense.

See the Committee Commentaries to Instructions 2.05 and 2.06 for definitions of the precise mental state required for various federal criminal offenses.

Bracketed paragraph (3)(C) should be included when the crime cannot be broken down neatly into two elements. Additional paragraphs should be added as needed to cover all the elements.

Bracketed paragraph (4) should be included when terms used in paragraphs (1)(A-C) require further explanation.

Bracketed paragraph (6) should be included when it would be

helpful to explain matters that need not be proved in order to convict. When used, a final sentence should be included for balance emphasizing what it is that the government must prove to convict.

COMMITTEE COMMENTARY 2.03

There is disagreement among the circuits over when the jury should be permitted to move on to consider a lesser included offense. The caselaw on this subject is fully discussed in the Committee Commentary to Instruction 8.07. Because there is no controlling Sixth Circuit authority on point, the Committee has included bracketed language in paragraph (1) to be used in the discretion of the district court. This bracketed language incorporates the concept that the jurors may move on to consider a lesser offense if they cannot unanimously agree on a verdict on the greater charge. If the district court believes that this concept is appropriate, this bracketed language should be added to the unbracketed language in paragraph (1). If the court believes that the jury should not be permitted to move on to consider a lesser offense unless it first unanimously acquits the defendant of the greater offense, then the bracketed language should be omitted. The Committee takes no position on which approach should be used.

Paragraph (2) suggests that the district court define the difference between the greater and lesser offenses. Other circuits that have drafted pattern instructions do not do this. But Federal Judicial Center Instruction 48 and Saltzburg and Perlman Instruction 3.64 do so, and there are persuasive reasons for this approach, despite the added burden it places on the district court. Lay jurors are ill-equipped to divine the difference between a greater and lesser offense without explicit guidance from the court. They are not lawyers. The definitions they are given, usually orally, are unfamiliar. And the amount of time devoted to "teaching" them the elements is brief. Without explicit guidance, the odds that they will accurately discern

the difference between a greater and lesser offense are poor, and the risk of a mistaken verdict is increased. For these reasons, this instruction recommends that the district court explicitly define the difference between the greater and lesser offense.

See generally Annotation, Propriety of Lesser-Included-Offense Charge to Jury in Federal Criminal Cases, 100 A.L.R. Fed. 481 (1990).

2.04

On or About

(1) Next, I want to say a word about the date mentioned in the indictment.

(2) The indictment charges that the crime happened "on or about" _____. The government does not have to prove that the crime happened on that exact date. But the government must prove that the crime happened reasonably close to that date.

USE NOTE: Use caution in giving this instruction if the defendant has raised an alibi defense dependent on particular dates; or if there is a statute of limitations question; or if the date charged is an essential element of the crime and the defendant may have been misled by the date charged in the indictment; or if giving this instruction would constructively amend the indictment.

COMMITTEE COMMENTARY 2.04

In Ledbetter v. United States, 170 U.S. 606, 612-613, 18 S. Ct. 774, 42 L. Ed. 1162 (1898), the Supreme Court rejected the defendant's argument that an indictment charging that the offense occurred "on the _____ day of April, 1896" was insufficient. The Court said that it was not necessary for the government to prove that the offense was committed on a particular day, unless the date is made material by the statute defining the offense. The Court said that ordinarily, proof of any date before the indictment and within the applicable statute of limitations will suffice.

In United States v. Ford, 872 F.2d 1231, 1236 (6th Cir. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 1946, 109 L.Ed.2d 309 (1990), the Sixth Circuit held that proof of the exact date of an offense is not required, as long as a date "reasonably near" that named in the indictment is established. Applying this rule to the case before it, the Sixth Circuit reversed the defendant's firearms possession conviction because the district court's "on or about" instruction permitted the jury to convict if it found that the defendant possessed a firearm on any date during an eleven month period preceding the date alleged in the indictment. The Sixth Circuit held that a date eleven months before the date alleged in the indictment did not satisfy the "reasonably near" requirement. Compare United States v. Arnold, 890 F.2d 825, 829 (6th Cir. 1989), where the Sixth Circuit held that the defendant was not unfairly prejudiced by a one month difference between the date alleged in the indictment and the evidence presented at trial where a prior trial of his co-defendants put him on notice that the alleged conspiracy was a continuing one.

Caution should be used in giving this instruction if the defendant raises an alibi defense. In United States v. Henderson, 434 F.2d 84, 86-89 (6th Cir. 1970), the Sixth Circuit reversed because the district court gave an "on or about" instruction in a case where there was no variance between the specific date charged in the indictment and the proofs presented at trial, and the defendant had presented a strong alibi defense for that date. See generally Annotation, Propriety and Prejudicial Effect of "On or About" Instruction Where Alibi Evidence in Federal Criminal Case Purports to Cover Specific Date Shown by Prosecution Evidence, 92 A.L.R. Fed. 313 (1989).

However, even when an alibi defense is raised, the district court retains the discretion to give an "on or about" instruction. United States v. Neuroth, 809 F.2d 339, 341-342 (6th Cir.)(en banc), cert. denied, 482 U.S. 916 (1987). In exercising this discretion, the district court should look at how specifically the indictment alleges the date on which the offense occurred, and compare that to the proofs at trial regarding the date of the offense. If the indictment or the proofs point exclusively to a particular date, it is preferable for the court not to give an "on or about" instruction. The court should also consider the type of crime charged. An "on or about" instruction may be more appropriate in a case involving a crime like conspiracy, where the proof as to when the crime occurred is more nebulous, than in a case involving a crime like murder, where the proof as to when the crime occurred may be more concrete. These factors are guidelines only, not a rigid formula. Id. at 342.

Caution also should be used in giving this instruction when there is a statute of limitations question, see Ledbetter v. United States, supra, 170 U.S. at 612, or when the date charged is an essential

element of the offense and the defendant may have been misled by the date alleged in the indictment. See United States v. Bourque, 541 F.2d 290, 293-296 (1st Cir. 1976); United States v. Goldstein, 502 F.2d 526, 528-530 (3rd Cir. 1974). See also United States v. Pandilidis, 524 F.2d 644, 647 (6th Cir. 1975)(while a mere change of date is not normally considered a substantial variation in an indictment, where the date of the alleged offense affects the determination of whether a crime has been committed, the change is considered material), cert. denied, 424 U.S. 933 (1976).

Caution also should be used in giving this instruction when the effect would be to constructively amend the indictment. See United States v. Ford, supra, 872 F.2d at 1236 (where the grand jury alleged that the defendant illegally possessed a firearm during a domestic argument on a particular date, an "on or about" instruction that permitted the jury to convict based on two earlier, unrelated acts of possession not alleged in the indictment constituted a constructive amendment in violation of the Fifth Amendment grand jury indictment guarantee).

2.05

Willfully

[No General Instruction Recommended]

COMMITTEE COMMENTARY 2.05

The Committee does not recommend any general instruction defining the term "willfully" because no single instruction can accurately encompass the different meanings this term has in federal criminal law. This term is "a word 'of many meanings, its construction often being influenced by its context'." Screws v. United States, 325 U.S. 91, 101, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) (Opinion of Douglas, J.), quoting Spies v. United States, 317 U.S. 492, 497, 63 S. Ct. 364, 87 L. Ed. 418 (1943).

The Committee instead recommends that the district court define the precise mental state required for the particular offense charged as part of the court's instructions defining the elements of the offense. This approach is consistent with the approach taken by the majority of the circuits that have drafted pattern instructions. See the Committee Comments to Fifth Circuit Instruction 1.36 ("The Committee has . . . abandoned . . . an inflexible definition of that term. Instead, we have attempted to define clearly what state of mind is required . . . to be guilty of the particular crime charged"), Seventh Circuit Instruction 6.03 ("[R]arely desirable to give a general definition of 'willfully' . . . [if] it must be defined, it should be defined in a manner tailoring it to the details of the particular offense charged"), Eighth Circuit Instruction 7.02 ("Committee recommends that the word 'willfully' not be used in jury instructions in most cases"), Ninth Circuit Instruction 5.05 ("Congressional purpose is more likely to be accomplished by avoiding the standard specific intent instruction and giving in its place an instruction which tracks the relevant statutory definition of the offense . . . in language tailored to the facts").

See also the Introduction to the Federal Judicial Center Instructions ("[W]e have abjured the term . . . 'willfully' . . . [and instead] have tried our best to make it clear what it is that a defendant must intend or know to be guilty of an offense"), and the Comments to Sand and Siffert Instruction 6.06 ("[N]o general instruction is advanced on . . . willfulness").

Of the circuits that have drafted pattern instructions, only the Eleventh unqualifiedly retains a general definition of the term willfully. See Eleventh Circuit Basic Instruction 9.1.

In United States v. Pomponio, 429 U.S. 10, 11-12, 97 S. Ct. 22, 50 L. Ed. 2d 12 (1976), the Supreme Court stated that the term "willfully" does not require proof of any evil motive or bad purpose other than the intention to violate the law.

To determine the precise mental state required for conviction, "each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove, taking into account constitutional considerations [citation omitted], as well as the common-law background, if any, of the crime involved." United States v. Renner, 496 F.2d 922, 926 (6th Cir. 1974), quoting United States v. Freed, 401 U.S. 601, 613-614, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971) (Brennan, J., concurring in the judgment). Below is an illustrative partial list of various federal crimes, along with the Sixth Circuit or United States Supreme Court decisions interpreting the precise meaning of the term "willfully." Care should be taken to check the current status of these decisions before incorporating them into an instruction.

1. Filing False Income Tax Return (26 U.S.C. §7206(1)): In the

context of §7206 and related offenses, the requirement that the defendant "willfully" file a false income tax return means that the defendant must voluntarily and intentionally violate a known legal duty. But no proof of any additional evil motive is required. United States v. Pomponio, 429 U.S. 10, 11-13, 97 S. Ct. 22, 50 L. Ed. 2d 12 (1976). See also United States v. Sassak, 881 F.2d 276, 278-280 (6th Cir. 1989). In Cheek v. United States, 498 U.S. ___, 111 S. Ct. 604, 610-611, 112 L. Ed. 2d 617, 629-631 (1991), the Supreme Court held that willfulness may be negated by a good faith misunderstanding of the legal duties imposed by the tax laws, even if the misunderstanding is not objectively reasonable, but that it cannot be negated by a good faith belief that a known legal duty is unconstitutional.

2. **Intercepting Wire or Oral Communications (18 U.S.C. §2511):** A defendant acts "willfully" for purposes of this statute if he knowingly or recklessly disregards a known legal duty. Farroni v. Farroni, 862 F.2d 109, 112 (6th Cir. 1988). Note that in 1986 Congress amended §2511, substituting the word "intentionally" for "willfully."

3. **Threatening the President's Life (18 U.S.C. §871):** A defendant acts "willfully" for purposes of this statute if he intentionally does what the law prohibits. United States v. Glover, 846 F.2d 339, 345

(6th Cir.), cert. denied, 488 U.S. 982 (1988). The government does not have to prove that the defendant had a n actual, subjective intent to carry out the threat. E.g., United States v. Vincent, 681 F.2d 462, 464 (6th Cir. 1982).

4. **Indirect Criminal Contempt (18 U.S.C. §401(3))**: "Willfulness" in this context means a deliberate or intended violation, as

distinguished from an accidental, inadvertent or negligent one. United States v. Smith, 815 F.2d 24, 25-26 (6th Cir. 1987). The Court reserved judgement on whether an additional specific intent or bad purpose to disobey a rule must also be proven.

5. **Obstructing the Mails (18 U.S.C. §1701):** The term "willfully and knowingly" in this context requires proof that the defendant had the specific intent to commit a wrongful act, and that he knew that the effect of his actions would be to obstruct the mails. United States v. Schankowski, 782 F.2d 628, 631-632 (6th Cir. 1986).

6. **Draft Evasion (50 U.S.C. §462(a)):** The term "willfully" in this context means to act voluntarily and purposely with the specific intent to do that which the law forbids--i.e. with bad purpose either to disobey or disregard the law. United States v. Krosky, 418 F.2d 65, 67 (6th Cir. 1969).

7. **Making False Statements Involving Federal Agency Matters (18 U.S.C. §1001):** The term "knowingly and willfully" in this context only requires the government to prove that the defendant made a statement with knowledge that it was false. There is no requirement that the government also prove that the defendant made the statement with actual knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63, 68-70, 104 S. Ct. 2936, 82 L. Ed. 2d 53 (1984). But see United States v. Gibson, 881 F.2d 318, 323-325 (6th Cir. 1989) (Merritt, J. dissenting) (subsequent Supreme Court decisions indicate that some level of culpability must be established even with regard to the jurisdictional element).

2.06

Knowingly

[No General Instruction Recommended]

COMMITTEE COMMENTARY 2.06

Most other circuits include a general definition of the term "knowingly" in their pattern instructions. See Fifth Circuit Instruction 1.35, Seventh Circuit Instruction 6.04, Ninth Circuit Instruction 5.06 and Eleventh Circuit Basic Instruction 9.2. But the meaning of the term "knowingly" varies depending on the particular statute in which it appears. For example, in Liparota v. United States, 471 U.S. 419, 433-434, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), the Supreme Court held that to convict a defendant of food stamp fraud, the government must prove that the defendant knew that his acquisition or possession of food stamps was unauthorized by statute or regulations. In contrast, in United States v. Elsehenawy, 801 F.2d 856, 857-859 (6th Cir. 1986), cert. denied, 479 U.S. 1094 (1987), the Sixth Circuit held that to convict a defendant of possessing contraband cigarettes, the government need only prove that the defendant knew the physical nature of what he possessed. The government need not prove that the defendant also knew that the cigarettes in his possession were required to be taxed, or that the required taxes had not been paid.

Because of these variations in meaning, the Committee does not recommend any general instruction defining the term "knowingly." Instead, the Committee recommends that the district court define the precise mental state required to convict as part of the court's instructions defining the elements of the offense. See for example the Introduction to the Federal Judicial Center Instructions ("[W]e have . . . avoided the word 'knowingly,' a term that is a persistent source of ambiguity in statutes as well as jury instructions [and] . . . have tried our best to make it clear what it is that a defendant must intend

or know to be guilty of an offense.").

Below is an illustrative partial list of various federal crimes and the Sixth Circuit or United States Supreme Court decisions interpreting the particular level of knowledge required to convict. Care should be taken to check the current status of these decisions before incorporating them into an instruction.

1. **Food Stamp Fraud (7 U.S.C. 2024(b)(1)):** The government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. Liparota v. United States, 471 U.S. 419, 433-434, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985).

2. **Possession of Contraband Cigarettes (18 U.S.C. §2342(a)):** The government need only prove the defendant knew the physical nature of what he possessed. There is no requirement that the government also prove the defendant knew that the cigarettes in his possession were required to be taxed, or that the required taxes had not been paid. United States v. Elshenawy, 801 F.2d 856, 857-859 (6th Cir. 1986), cert. denied, 479 U.S. 1094 (1987).

3. **Possession of Unregistered Firearm (26 U.S.C. §5861(d)):** The government need only prove the defendant knew that the instrument he possessed was a firearm. There is no requirement that the government also prove that the defendant knew the firearm was not registered. United States v. Freed, 401 U.S. 601, 607-610, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971). See also United States v. Poulos, 895 F.2d 1113, 1118 (6th Cir. 1990) (no requirement that the government prove knowledge that registration was required).

4. **Transferring an Unregistered Fully Automatic Weapon (26 U.S.C. §5861(e)):** At least when a weapon's outer appearance does not indicate that it is fully automatic, the government must prove that the defendant knew of the weapon's fully automatic nature. United States v. Williams, 872 F.2d 773 (6th Cir. 1989).

5. **Reentry Without Permission After Deportation (8 U.S.C. §1326):** The government need not prove that the defendant knew he was not entitled to reenter the country without the Attorney General's permission. United States v. Hussein, 675 F.2d 114, 115-116 (6th Cir.), cert. denied, 459 U.S. 869 (1982).

6. **Travel Act (18 U.S.C. §1952):** The government must prove that the defendant intended with bad purpose to violate the law of the

state of destination. United States v. Stagman, 446 F.2d 489, 494 (6th Cir. 1971).

7. **Interstate Transportation of Child Pornography (18 U.S.C. §2252):** The government need only prove that the defendant knowingly dealt in the prohibited material. There is no requirement that the government also prove that the defendant knew his doing so was statutorily unlawful. United States v. Tolczeki, 614 F. Supp. 1424, 1428-1429 (N.D. Ohio 1985).

8. **Controlled Substances:** There is no requirement that the government prove that the defendant knew the drugs he possessed were subject to federal regulation. United States v. Balint, 258 U.S. 250, 254, 42 S. Ct. 301, 66 L. Ed. 604 (1922).

9. **Making False Statements Involving Federal Agency Matters (18 U.S.C. §1001):** The term "knowingly and willfully" in this context only requires the government to prove that the defendant made a statement with knowledge it was false. There is no requirement that the government also prove the defendant made the statement with actual knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63, 68-70, 104 S. Ct. 2936, 82 L. Ed. 2d 53 (1984). But see United States v. Gibson, 881 F.2d 318, 323-325 (6th Cir. 1989) (Merritt, J. dissenting) (subsequent Supreme Court decisions indicate that some level of culpability must be established even with regard to the jurisdictional element).

10. **Assaulting a Federal Officer (18 U.S.C. §111):** There is no requirement that the government prove the defendant knew he was assaulting a federal officer. All the government must prove is the intent to assault. United States v. Feola, 420 U.S. 671, 684, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).

2.07

Specific Intent

[No General Instruction Recommended]

COMMITTEE COMMENTARY 2.07

In United States v. Bailey, 444 U.S. 394, 403, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980), the Supreme Court characterized the distinction between general and specific intent as "ambigu[ous]" and as "the source of a good deal of confusion." In Liparota v. United States, 471 U.S. 419, 433 n. 16, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), the Court noted that Devitt and Blackmar Instruction 14.03 on specific intent had been criticized as "too general and potentially misleading." The Court then said that "[a] more useful instruction might relate specifically to the mental state required [for the particular offense] and eschew use of difficult legal concepts like 'specific intent' and 'general intent'."

In United States v. S & Vee Cartage Co., 704 F.2d 914, 918-920 (6th Cir.), cert. denied, 464 U.S. 935 (1983), the district court refused to give any general instruction on general and specific intent. Instead, the court just instructed the jury on the precise mental state required to convict. The Sixth Circuit rejected the defendants' argument that an instruction on general and specific intent should have been given and affirmed the defendants convictions. The Sixth Circuit said that "[a] court may properly instruct the jury about the necessary mens rea without resorting to the words 'specific intent' or 'general intent'," and that "[i]t is sufficient to define the precise mental state required by the statute." Id. at 919.

Based on these cases, the Committee recommends that no general instruction on specific intent be given. Instead, the Committee recommends that the district court define the precise mental state required to convict as part of the court's instructions defining the

elements of the offense. For some federal crimes, this will require an instruction that the government must prove that the defendant intentionally violated a known legal duty. E.g., Cheek v. United States, 498 U.S. ___, 111 S. Ct. 604, 610-611, 112 L. Ed. 2d 617, 629-631 (1991). For other federal crimes, proof that the defendant knew an act was unlawful is not required to convict. E.g., United States v. S & Vee Cartage Co., supra 704 F.2d at 919.

This approach is consistent with the approach recommended by all of the circuits that have drafted pattern instructions. See for example the Committee Comments to Seventh Circuit Instruction 6.02 ("The Committee recommends avoiding instructions that distinguish between 'specific intent' and 'general intent' . . . . [and instead] recommends that instructions be given which define the precise mental state required by the particular offense charged."). See also the Committee Comments to Eighth Circuit Instruction 7.01, and Ninth Circuit Instruction 5.04. This is also the approach taken by the Federal Judicial Center Instructions. See Introduction ("[W]e have abjured the terms 'specific intent' and 'general intent'.").

See Committee Commentaries 2.05 and 2.06 for a partial list of some federal crimes and the precise mental state required to convict.

2.08

Inferring Required Mental State

(1) Next, I want to explain something about proving a defendant's state of mind.

(2) Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

(3) But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

(4) You may also consider the natural and probable results of any acts that the defendant knowingly did [or did not do], and whether it is reasonable to conclude that the defendant intended

those results. This, of course, is all for you to decide.

USE NOTE: The bracketed language in paragraph (4) should be used only when there is some evidence of a potentially probative failure to act.

COMMITTEE COMMENTARY 2.08

In United States v. Reeves, 594 F.2d 536, 541 (6th Cir.), cert. denied, 442 U.S. 946 (1979), the Sixth Circuit characterized Devitt and Blackmar Instruction 14.13 on proof of intent as a "wholly appropriate charge," and said that in future cases where such a charge is appropriate, "this Circuit will approve language similar to [this instruction]." Subsequent Sixth circuit cases also have approved this instruction. E.g., United States v. Thomas, 728 F.2d 313, 320-321 (6th Cir. 1984); United States v. Guyon, 717 F.2d 1536, 1539 (6th Cir. 1983), cert. denied, 465 U.S. 1067 (1984); United States v. Bohlmann, 625 F.2d 751, 752-753 (6th Cir. 1980).

In United States v. Gaines, 594 F.2d 541, 544 (6th Cir.), cert. denied, 442 U.S. 944 (1979), one Sixth Circuit panel appeared to question whether any such instruction should be given at all, stating, that "[i]f district judges in the Sixth Circuit charge at all on inferred intent, it is suggested that they do so in the language of . . . Devitt and Blackmar §14.13." The Committee believes that some instruction on inferred intent is appropriate, particularly in cases where the requisite intent is disputed, in order to provide the jury with some guidance on this subject.

Devitt and Blackmar Instruction 14.13 is quoted below. The line out indicates deletions suggested by the Sixth Circuit decisions cited above:

> "Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made ~~and done or omitted~~ by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence."

2.09

Deliberate Ignorance

(1) Next, I want to explain something about proving a defendant's knowledge.

(2) No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that _____, then you may find that he knew _____.

(3) But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that _____, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge, and is not enough to convict. This, of course, is all for you to decide.

USE NOTE: This instruction should be used only when there is some evidence of deliberate ignorance.

COMMITTEE COMMENTARY 2.09

The Sixth Circuit has repeatedly approved the concept that knowledge can be proved by deliberate ignorance or willful blindness. But it is less clear precisely what an instruction on this subject should say.

In United States v. Thomas, 484 F.2d 909, 912-914 (6th Cir.), cert. denied, 414 U.S. 912 (1973), the defendant was charged and convicted of knowingly making false statements in connection with the purchase of a handgun from a licensed dealer. The district court had instructed the jury that it could convict if it found from the evidence beyond a reasonable doubt that the Defendant "acted with reckless disregard of whether the statements made were true or with a conscious purpose to avoid learning the truth." Id. at 912-913. The Sixth Circuit concluded that this instruction "was proper." Id. at 913. Quoting from the Second Circuit's decision in United States v. Sarantos, 455 F.2d 877, 881 (2nd Cir. 1972), the Sixth Circuit explained that such an instruction was necessary to prevent a defendant from avoiding criminal sanctions "merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." Thomas, supra at 913.

In United States v. Seelig, 622 F.2d 207, 213 (6th Cir.), cert. denied, 449 U.S. 869 (1980), the defendants were charged and convicted of knowingly distributing controlled substances. On appeal they objected to the district court's instructions telling the jury that the element of knowledge could be inferred from proof that the defendants deliberately closed their eyes to what would otherwise be obvious to them. The Sixth Circuit held that this instruction was "not

erroneous," citing Thomas and noting that other circuits had approved deliberate ignorance instructions in cases involving violations of the Controlled Substances Act.

In United States v. Gullett, 713 F.2d 1203, 1212 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984), the defendants were charged and convicted of various offenses, including interstate transportation of stolen goods. On appeal they challenged the district court's instruction that the element of knowledge could be inferred from proof that the defendants "acted with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth." The defendants argued that this instruction permitted conviction on proof amounting to negligence. The Sixth Circuit rejected this argument, stating that the instruction only prevented a defendant from escaping conviction "by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." Citing Seelig, the Court noted that this interpretation, as well as the instruction itself, had already been upheld by the Sixth Circuit.

In United States v. Holloway, 731 F.2d 378, 380-381 (6th Cir. 1984) ("Holloway I"), several defendants were charged and convicted of making and presenting fraudulent tax refund checks to the Treasury Department. One defendant, Connor, challenged the district court's instruction that knowledge could be inferred from "proof that the defendant deliberately closed his eyes or her eyes to what would otherwise have been obvious to him or her." Id. at 380. He argued that the knowledge element could be satisfied only by proof that he had "a certain and clear perception of the falsity of the claim made." Id. at 380-381. The Sixth Circuit rejected this argument, explaining that the district court's instruction had been repeatedly upheld by previous

Sixth Circuit decisions.

In United States v. Holloway, 740 F.2d 1373 (6th Cir.) ("Holloway II"), cert. denied, 469 U.S. 1021 (1984), another defendant, Holloway, objected to the district court's knowledge instruction. The Sixth Circuit quoted the instruction in full as follows:

> "The fact of knowledge, however, may be established by direct or circumstantial evidence, just as any other fact in the case.
>
> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes or her eyes to what would otherwise have been obvious to him or her.
>
> A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from wilfull blindness to the existence of the fact.
>
> It is entirely up to you to--as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge." Id. at 1380.

The Sixth Circuit then held that "[t]here was no error in this instruction." Id.

In United States v. Lawson, 780 F.2d 535 (6th Cir. 1985), the defendants were charged and convicted of various stolen property offenses. They objected to the district court's knowledge instruction, which included the following paragraph:

> "An element of knowledge may be inferred from proof that a defendant deliberately closed his eyes to what would otherwise be obvious. The knowledge requirement may be satisfied also if you find from the evidence beyond a reasonable doubt that a defendant acted with a conscious purpose to avoid learning the truth."

The Sixth Circuit rejected the defendant's argument that this

instruction incorporated the equivalent of a negligence concept, and held that the instruction did not improperly lessen the government's burden of proving the necessary elements of the offense. Id. at 542. See also United States v. Hoffman, 918 F.2d 44, 46 (6th Cir. 1990) (No error in instructing that knowledge may be inferred from willful blindness.)

Some instructions from other circuits include the concept that if the jurors conclude the defendant actually believed the disputed fact did not exist, then they cannot find that the defendant acted knowingly. For example, Ninth Circuit Instruction 5.07 states:

> "You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that [e.g. drugs were in his automobile] and deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that the defendant actually believed that [e.g. no drugs were in his automobile], or if you find that the defendant was simply careless."

The Eighth and Eleventh Circuits follow the Ninth Circuit's approach. See Eighth Circuit Instruction 7.04 and Eleventh Circuit Special Instruction 15. The Fifth Circuit does not include this concept. See Fifth Circuit Instruction 1.35.

The only guidance on this subject from the United States Supreme Court is Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969). In Leary, the defendant challenged a statutory presumption that anyone who possesses marijuana will be presumed to do so "knowing" it was imported contrary to federal law. Id. at 30. After noting that the legislative history of the statute in question was of no help in determining the intended scope of the word "knowing," the Supreme Court said that it would employ "as a general guide" the

definition of "knowledge" contained in Section 2.02(7) of the Model Penal Code:

> "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." Leary, supra at 46 n. 93.

The Second Circuit also relied on this section of the Model Penal Code in its decision in United States v. Sarantos, supra, 455 F.2d at 881 n. 4. In United States v. Thomas, supra, 484 F.2d at 913-914, the Sixth Circuit's seminal decision on this subject, the Sixth Circuit relied on Second Circuit law in general, and on Sarantos in particular, in concluding that deliberate ignorance instructions were proper, but did not specifically mention or address this particular point.

Instruction 2.09 incorporates the Model Penal Code concept that the defendant must ignore a high probability that the disputed fact exists. Although the Sixth Circuit has not explicitly addressed this point, it has repeatedly used the term "obvious risk" in explaining the situations in which deliberate ignorance will suffice to supply proof of knowledge. Together with the Supreme Court's approval of this concept as a general guide in Leary, this is a justifiable clarification of what the term "obvious risk" means.

The instruction does not include the Model Penal Code concept that Knowledge cannot be established if the defendant "actually believes" that the disputed fact does not exist, for two reasons. First, no Sixth Circuit case has approved or required that this concept be included in a deliberate ignorance instruction. Second, it injects a troubling and unresolved burden of proof issue. Does the defendant have the burden of proving he actually believed the disputed fact did

not exist? Or must the government prove beyond a reasonable doubt that the defendant did not actually believe it? The Official Commentary to Section 2.02(7) of the Model Penal Code says that the burden is on the defendant to establish "an honest, contrary belief."

Second Circuit decisions have criticized the use of the word "recklessly" in instructions of this kind, on the ground that it might cause a jury to convict upon a finding of carelessness or negligence. See United States v. Precision Medical Laboratories, Inc., 593 F.2d 434, 444-445 (2nd Cir. 1978). But the Second Circuit has refused to reverse where the district court avoids any confusion by also instructing that mistake or carelessness on the defendant's part is not enough to convict. Id. at 445. The Sixth Circuit has refused to find plain error under similar circumstances. See United States v. Hoffman, supra, 918 F.2d at 46-47.

2.10

Constructive Possession

(1) Next, I want to explain something about possession. The government does not necessarily have to prove that the defendant physically possessed the _____ for you to find him guilty of this crime. The law recognizes two kinds of possession -- actual possession and constructive possession. Either one of these, if proved by the government, is enough to convict.

(2) To establish actual possession, the government must prove that the defendant had direct, physical control over the _____, and knew that he had control of it.

(3) To establish constructive possession, the government must prove that the defendant had the right to exercise physical control over the _____, and knew that he had this right, and that he intended to exercise physical control over _____ at some time, either directly or through other persons.

(4) For example, if you left something with a friend intending to come back later and pick it up, or intending to send someone else to pick it up for you, you would have constructive possession of it while it was in the actual possession of your friend.

(5) But understand that just being present where something is located does not equal possession. The government must prove that the defendant had actual or constructive possession of the _____, and knew that he did, for you to find him guilty of this crime. This, of course, is all for you to decide.

USE NOTE: This instruction should be used only when there is some evidence of constructive possession.

COMMITTEE COMMENTARY 2.10

The Sixth Circuit has long approved the concept that a defendant can be convicted of a possessory offense based on constructive possession. E.g., United States v. Craven, 478 F.2d 1329, 1333 (6th Cir.), cert. denied, 414 U.S. 866 (1973); United States v. Wolfenbarger, 426 F.2d 992, 994-995 (6th Cir. 1970); United States v. Burch, 313 F.2d 628, 629 (6th Cir. 1963). In Craven, the Sixth Circuit outlined the general principles governing this subject as follows:

> "Possession may be either actual or constructive and it need not be exclusive but may be joint. [citations omitted] Actual possession exists when a tangible object is in the immediate possession or control of the party. Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." Id. at 1333.

Accord United States v. Poulos, 895 F.2d 1113, 1118-1119 (6th Cir. 1990); United States v. Draper, 888 F.2d 1100, 1103 (6th Cir. 1989); United States v. Reeves, 794 F.2d 1101, 1105 (6th Cir.), cert. denied, 479 U.S. 963 (1986); United States v. Beverly, 750 F.2d 34, 37 (6th Cir. 1984).

In United States v. Ashley, 587 F.2d 841, 845 (6th Cir. 1978), the Sixth Circuit cited to an instruction on the inference to be drawn from unexplained possession of recently stolen property approved in United States v. Prujansky, 415 F.2d 1045, 1049 (6th Cir. 1969), and said that this instruction "properly set forth the difference between actual and constructive possession." The Prujansky instruction stated:

> "The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is in actual possession. What is constructive possession? A

> person not being in actual possession but having the right to exercise dominion and control over a thing is deemed to be in constructive possession.
>
> * * *
>
> The mere presence at the situs of property does not constitute possession; that is, a man innocently at the situs of a property does not mean that he is in possession of it. If he is innocently at the situs--I say innocently--he isn't deemed to be in possession of it. And that is logical to you members of the jury, I am sure." Id. at 1049.

In United States v. Stroble, 431 F.2d 1273, 1277 (6th Cir. 1970), the Sixth Circuit cited to the Second Circuit's decision in United States v. Casalinuovo, 350 F.2d 207 (2nd Cir. 1965), for a definition of constructive possession. In Casalinuovo, the Second Circuit defined constructive possession as "such a nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession." Casalinuovo, supra at 209. The Second Circuit approved the following instruction as "adequate," at least in the absence of an objection:

> "Did the defendant Casalinuovo have such possession and control of that room where some of the goods were found so that it can reasonably be said that he had possession of the merchandise?" Id.

In United States v. Williams, 526 F.2d 1000, 1003-1004 (6th Cir. 1975), the defendant argued that the district court erred in refusing his requested instruction that the "mere presence of a short-barreled shotgun under the driver's seat of the car, without some evidence that the driver exercised some dominion over it, is not sufficient for you to find that it was in the possession of the driver." The Sixth Circuit rejected this argument on the ground that the defendant's requested instruction would only have permitted conviction based on a

finding of actual possession. The Sixth Circuit stressed that in addition to correctly defining actual and constructive possession, the district court had also instructed the jury that the word "knowingly" was added to the definition of constructive possession to ensure "that no one would be convicted . . . because of mistake, or accident, or innocent reason." See also Federal Judicial Center Instruction 47B and Devitt and Blackmar Instruction 16.07

This instruction attempts to restate in plain English the general principles governing this subject stated by the Sixth Circuit in United States v. Craven, supra, 478 F.2d at 1333. It also includes the concept that mere presence at the place where the property is located is not enough to establish possession. See United States v. Prujansky, supra, 415 F.2d at 1049.

This instruction should not be given unless there is some evidence supporting a finding of constructive possession. United States v. James, 819 F.2d 674 (6th Cir. 1987) (reversible error to give constructive possession instruction where no evidence of constructive possession was presented). See also United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (cautions against use of boilerplate possession instruction including concepts of joint and constructive possession when neither concept was at issue given the facts of the case).

2.11

Joint Possession

(1) One more thing about possession. The government does not have to prove that the defendant was the only one who had possession of the _____. Two or more people can together share actual or constructive possession over property. And if they do, both are considered to have possession as far as the law is concerned.

(2) But remember that just being present with others who had possession is not enough to convict. The government must prove that the defendant had either actual or constructive possession of the _____, and knew that he did, for you to find him guilty of this crime. This, again, is all for you to decide.

USE NOTE: This instruction should be used only when there is some evidence of joint possession.

COMMITTEE COMMENTARY 2.11

The Sixth Circuit has long recognized that a defendant need not have exclusive possession of property to be convicted of a possessory offense. Joint possession will suffice. See United States v. Craven, 478 F.2d 1329, 1333 (6th Cir.), cert. denied, 414 U.S. 866 (1973). But this instruction should not be given unless there is some evidence of joint possession. See United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (cautions against use of boilerplate possession instruction including concepts of joint and constructive possession when neither concept was at issue given the facts of the case).

See generally Fifth Circuit Instruction 1.31, Eleventh Circuit Special Instruction 4, Federal Judicial Center Instruction 47B and Devitt and Blackmar Instruction 16.07.

Chapter 3.00

Conspiracy

3.01A

Conspiracy to Commit an Offense--Basic Elements

(1) Count _____ of the indictment accuses the defendants of a conspiracy to commit the crime of _____ in violation of federal law. It is a crime for two or more persons to conspire, or agree, to commit a criminal act, even if they never actually achieve their goal.

(2) A conspiracy is a kind of criminal partnership. For you to find any one of the defendants guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that two or more persons conspired, or agreed, to commit the crime of _____.

(B) Second, that the defendant knowingly and voluntarily joined the conspiracy.

(C) And third, that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(3) You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find any one of these defendants guilty of the conspiracy charge.

USE NOTE: This instruction should be followed by Instructions 3.02 through 3.04, plus those of Instructions 3.05 through 3.14 as are appropriate given the facts of the particular case.

Paragraph (2)(C) should be deleted when the statute under which the defendant is charged does not require proof of an overt act. In such cases, all references to overt acts in other instructions should also be deleted.

If the object offense is not charged and defined elsewhere in the instructions, it must be defined at some point in the conspiracy instructions.

COMMITTEE COMMENTARY 3.01A

The Supreme Court has long recognized that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." E.g., Pinkerton v. United States, 328 U.S. 640, 643, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). As stated by the Sixth Circuit in United States v. Van Hee, 531 F.2d 352, 357 (6th Cir. 1976), "a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." An equally well-settled corollary is that to convict a defendant of conspiracy does not require proof that the object of the conspiracy was achieved. E.g., United States v. Fruehauf Corp., 577 F.2d 1038, 1071 (6th Cir.), cert. denied 439 U.S. 953 (1978). "The gist of the crime of conspiracy is the agreement to commit an illegal act, not the accomplishment of the illegal act." Id.

The purpose of this instruction is to briefly outline the basic elements of conspiracy. See generally 18 U.S.C. § 371. It is modeled after Federal Judicial Center Instruction 62. It follows the basic format for defining the crime used in Instruction 2.02. It is meant to be followed by Instructions 3.02 through 3.04, plus those of instructions 3.05 through 3.14 as are appropriate given the facts of the particular case.

Some federal statutes contain their own separate conspiracy provision that does not require the commission of an overt act. See, e.g., 21 U.S.C. § 846. In such cases paragraph (2)(C) should be deleted, along with all references in other instructions to the subject of overt acts. See, e.g., United States v. Schultz, 855 F.2d 1217, 1222 (6th Cir. 1988) ("conviction of conspiracy under 21 U.S.C. section

846 does not require proof of an overt act"). See also United States v. Nelson, 922 F.2d 311, 317-318 (6th Cir. 1990) (No instruction on overt acts is necessary even if the indictment lists overt acts committed in furtherance of the conspiracy).

Generally speaking, the government need not prove any special mens rea beyond the degree of criminal intent required for the object offense in order to convict a defendant of conspiracy. United States v. Feola, 420 U.S. 671, 686-696, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975). See also Committee Commentary 3.05 (no instruction on bad purpose or corrupt motive recommended). Instruction 3.03, which requires the government to prove that the defendant knew the conspiracy's main purpose, and voluntarily joined it "intending to help advance or achieve its goals," should suffice in most cases, particularly where the object offense is also charged and defined elsewhere in the instructions.

If the object offense is not charged and defined elsewhere, it must be defined at some point in the conspiracy instructions. See United States v. Vaglica, 720 F.2d 388, 391 (5th Cir. 1983) ("serious" error not to do so). In order not to interrupt the continuity of the conspiracy instructions, the Committee suggests that in such cases, the object offense be defined either after the first sentence of this instruction, or following Instruction 3.04.

3.01B

Conspiracy to Defraud the United States--Basic Elements

(1) Count _____ of the indictment accuses the defendants of a conspiracy to defraud the United States by dishonest means in violation of federal law. It is a crime for two or more persons to conspire, or agree, to defraud the United States, even if they never actually achieve their goal.

(2) A conspiracy is a kind of criminal partnership. For you to find any one of the defendants guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that two or more persons conspired, or agreed, to defraud the United States, or one of its agencies or departments, by dishonest means. The word "defraud" is not limited to its ordinary meaning of cheating the government out of money or property. "Defraud" also means impairing, obstructing or defeating the lawful function of any government agency or department by dishonest means.

(B) Second, the government must prove that the defendant

knowingly and voluntarily joined the conspiracy.

(C) And third, the government must prove that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(3) You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find any one of these defendants guilty of the conspiracy charge.

[(4) This crime does not require proof that the defendants intended to directly commit the fraud themselves. Proof that they intended to use a third party as a go-between may be sufficient. But the government must prove that the United States or one of its agencies or departments was the ultimate target of the conspiracy, and that the defendants intended to defraud.]

USE NOTE: This instruction should be followed by Instructions 3.02 through 3.04, plus those of Instructions 3.05 through 3.14 as are appropriate given the facts of the particular case.

Appropriate "to defraud the United States" language should be substituted in Instructions 3.02 through 3.14 in place of the "to commit the crime of" language that appears in those instructions.

Bracketed paragraph (4) should be included when there is evidence that a third party served as an intermediary between the defendants and the United States.

COMMITTEE COMMENTARY 3.01B

The general federal conspiracy statute, 18 U.S.C. §371, prohibits two distinct types of conspiracies. The first is any conspiracy to "commit any offense" against the United States. The second is any conspiracy to "defraud the United States or any agency thereof." See generally United States v. Levinson, 405 F.2d 971, 977 (1968), 395 U.S. 958 (1969). This instruction is designed for use in connection with indictments charging a conspiracy to defraud the United States. It should be followed by Instructions 3.02 through 3.04, plus those of instructions 3.05 through 3.14 as are appropriate given the facts of the particular case. Appropriate "to defraud the United States" language should be substituted in Instructions 3.02 through 3.14 in place of the "to commit the crime of" language that appears in those instructions.

Bracketed paragraph (4) should be included when there is evidence that the defendants intended to accomplish the fraud by going through or manipulating a third party. In Tanner v. United States, 483 U.S. 107, 129-132, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987), the Supreme Court accepted the government's argument that a conspiracy to defraud the United States under §371 may be committed indirectly by the use of third parties. "The fact that a false claim passes through the hands of a third party on its way . . . to the United States" does not relieve the defendants of criminal liability. Id. at 129. The Supreme Court remanded in Tanner for consideration of whether the evidence supported the government's theory that the defendants conspired to manipulate a third party in order to cause that third party to make misrepresentations to a federal agency. Id. at 132. See also United

States v. Gibson, 881 F.2d 318, 321 (6th Cir. 1989) ("a conspiracy [to defraud] could be directed at the United States as a target and yet be effected through a third party such as a private business").

In prosecutions under the conspiracy to defraud clause of 18 U.S.C. §371, the United States must be the target of the conspiracy. Tanner v. United States, supra, 483 U.S. at 128-132. Accord United States v. Minarik, 875 F.2d 1186, 1191 (6th Cir. 1989). In prosecutions brought under the conspiracy to commit an offense clause of §371, the United States need not be the target. United States v. Gibson, supra, 881 F.2d at 321.

The term "defraud" has a broader meaning than simply cheating the government out of property or money. United States v. Minarik, supra, 875 F.2d at 1190. It includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government," Tanner v. United States, supra, 483 U.S. at 128, by "deceit, craft, or trickery, or at least by means that are dishonest." Minarik, supra at 1190-1191, quoting Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S. Ct. 511, 68 L. Ed. 968 (1924). See also United States v. Shermetaro, 625 F.2d 104, 109 (6th Cir. 1980); United States v. Levinson, supra, 405 F.2d at 977.

3.02

Agreement

(1) With regard to the first element--a criminal agreement--the government must prove that two or more persons conspired, or agreed, to cooperate with each other to commit the crime of _____.

(2) This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

(3) What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to commit the crime of _____. This is essential.

(4) An agreement can be proved indirectly, by facts and

circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

[(5) One more point about the agreement. The indictment accuses the defendants of conspiring to commit several federal crimes. The government does not have to prove that the defendants agreed to commit all these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.]

USE NOTE: Bracketed paragraph (5) should be included when the indictment alleges multiple object offenses. It is unclear whether an augmented unanimity instruction specifically requiring unanimous agreement on the same object offense is necessary. See generally Instruction 8.03A and Committee Commentary.

Specific instructions that an agreement between a defendant and a government agent will not support a conspiracy conviction may be required where important given the facts of the particular case.

COMMITTEE COMMENTARY 3.02

18 U.S.C. § 371 states that "two or more persons" must conspire in order to establish a conspiracy. This statute has been consistently interpreted to require proof of an agreement between the defendant and at least one other person as "an absolute prerequisite" to a conspiracy conviction. E.g., United States v. Bouquett, 820 F.2d 165, 168 (6th Cir. 1987). Accord United States v. Phillips, 630 F.2d 1138, 1146-1147 (6th Cir. 1980); United States v. Sandy, 605 F.2d 210, 215 (6th Cir.), cert. denied, 444 U.S. 984 (1979); United States v. Williams, 503 F.2d 50, 54 (6th Cir. 1974). It is "clear that the crime of conspiracy cannot be committed by an individual acting alone since, by definition, conspiracy is a group offense." United States v. Sachs, 801 F.2d 839, 845 (6th Cir. 1986). See also United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973) ("There must be at least two participants in a conspiracy . . . [o]ne man cannot conspire with himself.").

Sixth Circuit decisions have repeatedly defined the nature of the agreement that the government must prove as "an agreement between two or more persons to act together in committing an offense." E.g., United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir. 1988); United States v. Butler, 618 F.2d 411, 414 (6th Cir.), cert. denied, 447 U.S. 927 (1980); United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979); United States v. Williams, 503 F.2d 50, 54 (6th Cir. 1974). See also United States v. Bostic, supra, 480 F.2d at 968 ("[a]n agreement or understanding between two or more of the defendants whereby they become definitely committed to cooperate for the accomplishment of the [criminal] object").

Because conspirators "do not usually make oral or written

agreements of their illegal plans with exactitude," United States v. Duff, 332 F.2d 702, 705 (6th Cir. 1964), it is well-established that the government does not have to prove that there was any formal written or spoken agreement. Id. Accord United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990); Blue v. United States, 138 F.2d 351, 360 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944). Nor must the government prove that there was agreement on all the details of how the crime would be carried out. E.g., United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988).

Pattern instructions from other circuits commonly include language that mere association, discussion of common interests or similar conduct does not necessarily prove, or is not enough, standing alone, to prove a criminal agreement. See Fifth Circuit Instruction 2.21, Eighth Circuit Instruction 5.06B, Ninth Circuit Instruction 8.05A and Eleventh Circuit Offense Instruction 4.1. See also United States v. Davenport, 808 F.2d 1212, 1218 (6th Cir. 1987) (quoting instructions that "mere association . . ., similarity of conduct . . ., assembl[y] . . . and discuss[ion] [of] common aims" does not necessarily establish the existence of a conspiracy).

What the government must prove "is that the members in some way or manner . . . positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." United States v. Duff, supra, 332 F.2d at 706. A "tacit or mutual understanding" among the parties will suffice. E.g., United States v. Pearce, 912 F.2d 159, 161 (6th Cir. 1990); United States v. Hughes, 891 F.2d 597, 601 (6th Cir. 1989); United States v. Ellzey, 874 F.2d 324, 328 (6th Cir. 1989); United States v. Bavers, 787 F.2d 1022, 1026 (6th Cir. 1985).

It is well-established that the government does not have to

present direct evidence of an agreement. E.g., United States v. Thompson, 533 F.2d 1006, 1009 (6th Cir.), cert. denied, 429 U.S. 939 (1976); United States v. Levinson, 405 F.2d 971, 985-986 (6th Cir. 1968), cert. denied, 395 U.S. 958 (1969); Windsor v. United States, 286 F. 51, 53 (6th Cir.), cert. denied, 262 U.S. 748 (1923). The rationale for this rule is that "[s]ecrecy and concealment are essential features of [any] successful conspiracy," United States v. Webb, 359 F.2d 558, 563 (6th Cir.), cert. denied, 385 U.S. 824 (1966), so that "it is a rare case in which [direct] evidence may be found." United States v. Richardson, supra, 596 F.2d at 162. Accord United States v. Miller, 358 F.2d 696, 697 (6th Cir. 1966). An agreement "may be inferred from circumstantial evidence that can reasonably be interpreted as participation in a common plan," United States v. Ellzey, supra, 874 F.2d at 328; United States v. Reifsteck, supra, 841 F.2d at 704; United States v. Bavers, supra, 787 F.2d at 1026, or "from acts done with a common purpose." United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990); United States v Ayotte, 741 F.2d 865, 867 (6th Cir.), cert. denied, 469 U.S. 1076 (1984).

Bracketed paragraph (5) should be included when the indictment alleges multiple object offenses. A single conspiracy may involve multiple object offenses. Braverman v. United States, 317 U.S. 49, 52-54, 63 S. Ct. 99, 87 L. Ed. 23 (1942). But proof that the defendants conspired to commit only one offense is sufficient to convict. See 18 U.S.C. §371 (prohibiting two or more persons from conspiring to commit "any" offense).

The Sixth Circuit has not directly addressed whether the trial court must give an augmented unanimity instruction specifically telling the jurors that they must unanimously agree on the same object offense

in order to convict. But the general rule in the Sixth Circuit is that no augmented unanimity instruction is required unless special circumstances are present. See Committee Commentary to Instruction 8.03A--Unanimity of Theory. In United States v. Bouquett, 820 F.2d 165, 169 (6th Cir. 1987), the Sixth Circuit rejected the defendant's argument that his conspiracy conviction should be reversed because the trial court's instructions permitted the jury to convict based on alternate theories of who in particular the defendant conspired with in the context of a single conspiracy. The Sixth Circuit held that these alternate theories did not create "two conceptual groupings requiring an augmented unanimity instruction, and stated that "this court does not require jurors to agree unanimously as to a theory of guilt where a single generic offense may be committed by a variety of acts."

Of the circuits that have drafted pattern instructions, only the Eighth and Eleventh Circuits explicitly require the jury to reach unanimous agreement on the same object offense. See Eighth Circuit Instruction 5.06F and Eleventh Circuit Offense Instruction 4.2. Both circuits rely on United States v. Ballard, 663 F.2d 534, 544 (5th Cir. 1981), as authority for the proposition that such an instruction is required.

Related to this is the problem posed by cases where the jury is instructed on multiple object offenses, and returns a general verdict of guilty, but there was insufficient evidence to support one of the object offenses. See Yates v. United States, 354 U.S. 298, 311-312, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957) (a general verdict of guilty on a multi-object count must be set aside when the verdict is "supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"). See also United States v. Beverly, 913

F.2d 337 (7th Cir. 1990), cert. granted sub nom. Griffin v. United States, ____ U.S. ____, 111 S. Ct. 951, ____ L. Ed. 2d ____ (1991) (No. 90-6352) (same issue).

In United States v. Schultz, supra, 855 F.2d at 1221, the Sixth Circuit approvingly cited the First Circuit's decision in United States v. Anello, 765 F.2d 253, 262-263 (lst Cir.), cert. denied, 474 U.S. 996 (1985), for the proposition that a conditional agreement to purchase controlled substances if the quality is adequate is sufficient to support a conspiracy conviction. The Sixth Circuit then went on to hold that a failure to complete the substantive object offense as a result of disagreements among the conspirators over the details of performance did not preclude the existence of a conspiratorial agreement.

In United States v. S & Vee Cartage Company, 704 F.2d 914, 920 (6th Cir.), cert. denied, 464 U.S. 935 (1983), a corporate defendant and two of its officers were convicted of making and conspiring to make false pension and welfare fund statements, in violation of 18 U.S.C. §1027 and 18 U.S.C. §371. On appeal, the three defendants argued that their conspiracy convictions should be reversed on the theory that a criminal conspiracy cannot exist between a corporation and its officers acting as agents of the corporation. The Sixth Circuit rejected this argument, and held that in criminal cases a corporation may be convicted of conspiring with its officers. In doing so, the Sixth Circuit rejected agency principles that treat the acts of corporate officers as the acts of the corporation as a single legal entity. Accord United States v. Sintering, 927 F.2d 232 (6th Cir. 1991); United States v. Mahar, 801 F.2d 1477, 1488 (6th Cir. 1986).

It is settled that "proof of an agreement between a defendant and

a government agent or informer will not support a conspiracy conviction." United States v. Pennell, 737 F.2d 521, 536 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985). Where important given the facts of the particular case, specific instructions on this point may be required. United States v. Nunez, 889 F.2d 1564, 1568-1570 (6th Cir. 1989).

Wharton's Rule, which may require proof that more than two persons conspired together, only applies to federal crimes that by definition require voluntary concerted criminal activity by a plurality of agents. See Iannelli v. United States, 420 U.S. 770, 777-786, 95 S.Ct. 1284, 43 L.Ed.2d. 616 (1975). And it does not apply at all if there is legislative intent to the contrary. Id. See also United States v. Finazzo, 704 F.2d 300, 305-306 (6th Cir.), cert. denied, 463 U.S. 1210 (1983).

3.03

Defendant's Connection to the Conspiracy

(1) If you are convinced that there was a criminal agreement, then you must decide whether the government has proved that the defendants knowingly and voluntarily joined that agreement. You must consider each defendant separately in this regard. To convict any defendant, the government must prove that he knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals.

(2) This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, or that his connection to it was substantial. A slight role or connection may be enough.

(3) But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is

not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

(4) What the government must prove is that a defendant knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals. This is essential.

(5) A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew the conspiracy's main purpose. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

USE NOTE: Additional instructions may be appropriate in cases involving defendants who were merely purchasers of stolen goods or contraband, or who were merely suppliers of goods or other items used to commit a crime.

COMMITTEE COMMENTARY 3.03

In order to establish a defendant's connection to a conspiracy, the government must prove that he "knew of the conspiracy, and that he knowingly and voluntarily joined it." United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986). Accord United States v. Bibby, 752 F.2d 1116, 1124 (6th Cir. 1985) ("An essential part of any conspiracy conviction is a showing that a particular defendant knew of and adopted the conspiracy's main objective."), cert. denied, 475 U.S. 1010 (1986). See also United States v. Hamilton, 689 F.2d 1262, 1275 (6th Cir. 1982) ("the evidence here plainly shows that [the defendant] knew of the conspiracy and voluntarily became a participant in it"), cert. denied, 459 U.S. 1117 (1983); United States v. Mayes, 512 F.2d 637, 647 (6th Cir.) (defendant must join "with knowledge of the conspiracy and its purpose"), cert. denied, 422 U.S. 1008 (1975); United States v. Levinson, 405 F.2d 971, 985 (6th Cir. 1968) (defendant must "know of the conspiracy, associate himself with it and knowingly contribute his efforts in its furtherance"), cert. denied, 395 U.S. 958 (1969).

To convict a defendant of conspiracy, "two different types of intent are generally required--the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy." United States v. United States Gypsum Co., 438 U.S. 422, 443 n. 20, 90 S. Ct. 2864, 57 L. Ed. 2d 854 (1978).

It is not uncommon for conspiracy instructions to require proof that the defendant "willfully" joined the conspiracy. See for example United States v. Davenport, 808 F.2d 1212, 1218 (6th Cir. 1987); United States v. Piccolo, 723 F.2d 1234, 1240 (6th Cir. 1983), cert. denied,

466 U.S. 970 (1984). To the extent that the term "willfully" connotes some extra mental state beyond that required for conviction of the substantive offense that is the object of the conspiracy, it is inconsistent with the Supreme Court's decision in United States v. Feola, 420 U.S. 671, 686-696, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975) (generally speaking, the government need not prove anything more than the degree of criminal intent necessary for the substantive offense in order to convict a defendant of conspiracy). To avoid confusion, the Committee has substituted the word "voluntarily" for "willfully."

Although the government must prove that the defendant knew the conspiracy's main purpose, "[s]ecrecy and concealment are essential features of [a] successful conspiracy . . . [and] [h]ence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details." United States v. Miller, 358 F.2d 696, 697 (6th Cir. 1966), quoting Blumenthal v. United States, 332 U.S. 539, 557, 68 S. Ct. 248, 92 L. Ed. 154 (1947). The defendant "must know the purpose of the conspiracy, but not necessarily the full scope thereof, the detailed plans, operation, membership, or even the purpose of the other members of the conspiracy." United States v. Warner, 690 F.2d 545, 550 (6th Cir. 1982), quoting United States v. Shermetaro, 625 F.2d 104, 108 (6th Cir. 1980). See also United States v. Chambers, 382 F.2d 910, 913 (6th Cir. 1967) ("A person may be guilty of conspiracy even though he has limited knowledge as to the scope of the conspiracy and no knowledge of details of the plan or operation in furtherance thereof or of the membership in the conspiracy or of the part played by each member and the division of the spoils.").

Related to this, it is not necessary that a defendant be a member of the conspiracy from the very beginning. E.g., United States v. Stephens, 492 F.2d 1367, 1373 (6th Cir.), cert. denied, 419 U.S. 852 (1974).

Knowledge of the existence of a conspiracy cannot be avoided by closing one's eyes "to what [is] going on about him." United States v. Smith, 561 F.2d 8, 13 (6th Cir.), cert. denied, 434 U.S. 958 (1977). In such cases, a deliberate ignorance instruction may be appropriate. See Instruction 2.09.

A defendant's knowledge of a conspiracy need not be proved by direct evidence. Circumstantial evidence will suffice. E.g., United States v. Christian, supra, 786 F.2d at 211; United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979); United States v. Levinson, supra, 405 F.2d at 985. See also United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990) (knowledge inferred from various circumstances).

In cases involving alleged co-conspirators who were merely purchasers of stolen goods or contraband, or suppliers of goods or other items used to commit a crime, additional instructions may be appropriate. See United States v. Meyers, 646 F.2d 1142, 1145 (6th Cir. 1981); United States v. Grunsfeld, 558 F.2d 1231, 1235-1237 (6th Cir.), cert. denied, 424 U.S. 872 (1977); United States v. Mayes, 512 F.2d 637, 646-648 (6th Cir.), cert. denied, 422 U.S. 1008 (1975); United States v. Bostic, 480 F.2d 965, 968-969 (6th Cir. 1973).

A defendant's connection to a conspiracy "need only be slight, if there is sufficient evidence to establish that connection beyond a reasonable doubt." United States v. Christian, supra, 786 F.2d at 211.

"All with criminal intent who join themselves even slightly to the principal scheme are subject to the [conspiracy] statute. . . ." Blue v. United States, 138 F.2d 351, 359 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944). See also United States v. Scartz, 838 F.2d 876, 880 (6th Cir.) (nature and extent of a member's involvement need only be slight), cert. denied, 488 U.S. 923 (1988).

Sixth Circuit decisions have repeatedly held that mere presence, association, knowledge, approval or acquiescence is not sufficient to convict a defendant of conspiracy. See, e.g., United States v. Pearce, 912 F.2d 159, 162 (6th Cir. 1990) ("mere association with conspirators is not enough to establish participation in a conspiracy"); United States v. Christian, supra, 786 F.2d at 211 ("[m]ere presence at the crime scene is insufficient"); United States v. Richardson, supra, 596 F.2d at 162 ("[m]ere knowledge, approval of or acquiescence in the object or purpose of the conspiracy . . . is not sufficient"); United States v. Webb, 359 F.2d 558, 562 (6th Cir.) ("neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation in a conspiracy"), cert. denied, 385 U.S. 824 (1966). Sixth Circuit cases have also indicated that mere assistance is insufficient. See the instructions quoted in United States v. Davenport, supra, 808 F.2d at 1218. See also Fifth Circuit Instruction 2.21 ("a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of the conspiracy, does not thereby become a conspirator").

Although these things are not enough, standing alone, to convict a defendant of conspiracy, Sixth Circuit decisions indicate that they are factors that the jury may properly consider. See United States v. Christian, supra, 786 F.2d at 211 ("Although mere presence alone is

insufficient to support a guilty verdict, presence is a material and probative factor which the jury may consider in reaching its decision.").

What the government must prove to convict has been variously described. In United States v. Richardson, supra, 596 F.2d at 162, the Sixth Circuit said that there must be proof of "an intention and agreement to cooperate in the crime." Accord United States v. Williams, 503 F.2d 50, 54 (6th Cir. 1974). In United States v. Webb, supra, 359 F.2d at 562, the Sixth Circuit said that there must be proof of the defendant's "agreement to or participation in a plan to violate the law." And in United States v. Bostic, supra, 480 F.2d at 968, the Sixth Circuit said that there must be "intentional participation in the transaction with a view to the furtherance of the common design and purpose."

3.04

Overt Acts

(1) The third element that the government must prove is that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(2) The indictment lists _____ overt acts. The government does not have to prove that all these acts were committed, or that any of these acts were themselves illegal.

(3) But the government must prove that at least one of these acts was committed by a member of the conspiracy, and that it was committed for the purpose of advancing or helping the conspiracy. This is essential.

[(4) One more thing about overt acts. There is a limit on how much time the government has to obtain an indictment. This is called the statute of limitations. For you to return a guilty verdict on the conspiracy charge, the government must convince you beyond a reasonable doubt that at least one overt act was committed for the purpose of advancing or helping the conspiracy after _____.]

USE NOTE: This instruction should be omitted when the statute under which the defendant is charged does not require proof of an overt act.

It is unclear whether an augmented unanimity instruction specifically requiring unanimous agreement on the same overt act is necessary. See generally Instruction 8.03A and Committee Commentary.

Bracketed paragraph (4) should be included when compliance with the statute of limitations is an issue. Appropriate modifications should be made when evidence has been presented that there were two separate and successive conspiracies, one of which does not fall within the five year statute of limitations period for conspiracy.

COMMITTEE COMMENTARY 3.04

Proof of an overt act is an essential element of any conspiracy prosecution brought under 18 U.S.C. §371. E.g., United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir. 1988); United States v. Williams, 503 F.2d 50, 54 (6th Cir. 1974). For a general explanation of the overt act requirement, see Sandroff v. United States, 174 F.2d 1014, 1018-1019 (6th Cir. 1949), cert. denied, 338 U.S. 947 (1950). The language of the proposed instruction is modeled after language used in Federal Judicial Center Instruction 62.

Some federal statutes contain their own separate conspiracy provision that does not require the commission of an overt act. See for example 21 U.S.C. §846. In such cases this instruction should be omitted. See, e.g., United States v. Schultz, 855 F.2d 1217, 1222 (6th Cir. 1988) ("conviction of conspiracy under 21 U.S.C. section 846 does not require proof of an overt act"). See also United States v. Nelson, 922 F.2d 311, 317-318 (6th Cir. 1990) (No instruction on overt acts is necessary even if the indictment lists overt acts committed in furtherance of the conspiracy).

The government is only required to prove one overt act committed in furtherance of the conspiracy in order to convict. See United States v. Nowak, 448 F.2d 134, 140 (6th Cir. 1971)(approving instruction requiring that "at least one overt act as set forth in the indictment was committed"), cert. denied, 404 U.S. 1039 (1972); Sandroff v. United States, supra, 174 F.2d at 1018-1019 (approving instruction that "there need be but one overt act" established); Wilkes v. United States, 291 F. 988, 995 (6th Cir. 1923) ("[I]t was not necessary to conviction to prove that more than one of the overt acts charged in the indictment had been committed"), cert. denied, 263 U.S.

719 (1924).

"[I]t [is] not necessary that any overt act charged in a conspiracy indictment constitute in and of itself a separate criminal offense." United States v. Cooper, 577 F.2d 1079, 1085 (6th Cir.), cert. denied, 439 U.S. 868 (1978). See also Sandroff v. United States, supra, 174 F.2d at 1018 ("An overt act . . . need not necessarily be a criminal act, nor a crime that is the object of the conspiracy, but . . . [it] must be done in furtherance of the object of the agreement."); United States v. Reifsteck, supra, 841 F.2d at 704 ("[E]ach overt act taken to effect the illegal purpose of the conspiracy need not be illegal in itself."). Acts which, when viewed in isolation, are in themselves legal, "lose that character when they become constituent elements of an unlawful scheme." United States v. Van Hee, 531 F.2d 352, 357 (6th Cir. 1976).

The Sixth Circuit has not directly addressed whether the trial court must give an augmented unanimity instruction specifically telling the jurors that they must unanimously agree on the same overt act in order to convict. But the general rule in the Sixth Circuit is that no augmented unanimity instruction is required unless special circumstances are present. See the Committee Commentary to Instruction 8.03A--Unanimity of Theory. In United States v. Bouquett, 820 F.2d 165, 169 (6th Cir. 1987), the Sixth Circuit rejected the defendant's argument that his conspiracy conviction should be reversed because the trial court's instructions permitted the jury to convict based on alternate theories of who in particular the defendant conspired with in the context of a single conspiracy. The Sixth Circuit held that these alternate theories did not create "two conceptual groupings" requiring an augmented unanimity instruction, and stated that "this court does not require jurors to agree unanimously as to a theory of guilt where

a single generic offense may be committed by a variety of acts."

Of the circuits that have drafted pattern instructions, only the Eighth and Ninth Circuits explicitly require the jury to reach unanimous agreement on the same overt act. See Eighth Circuit Instruction 5.06D and Ninth Circuit Instruction 8.05A.

Bracketed paragraph (4) should be included when compliance with the statute of limitations is an issue. The statute of limitations for prosecutions initiated under 18 U.S.C. § 371 is five years from the date of the commission of the last overt act in furtherance of the conspiracy. Fiswick v. United States, 329 U.S. 211, 216, 67 S. Ct. 224, 91 L. Ed. 196 (1946); United States v. Zalman, 870 F.2d 1047, 1057 (6th Cir. 1989). Other circuits have held, or indicated, that overt acts not alleged in the indictment can be used to prove that a conspiracy continued into the statute of limitations period, as long as fair notice principles are satisfied. See, e.g., United States v. Read, 658 F.2d 1225, 1239 (7th Cir. 1981); United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985); United States v. Elliott, 571 F.2d 880, 911 (5th Cir. 1978). The proposed instruction is based on the Seventh Circuit's decision in United States v. Nowak, 448 F.2d 134, 140 (7th Cir. 1971) (instruction that "one or more of the overt acts occurred after February 6, 1964" was a sufficient instruction on the statute of limitations defense), cert. denied, 404 U.S. 1039 (1972).

When evidence has been presented that there were two separate and successive conspiracies, one of which does not fall within the five year statute of limitations period for conspiracy, appropriate modifications should be made in bracketed paragraph (4). See United States v. Zalman, supra, 870 F.2d at 1057. See also Instructions 3.08 and 3.09.

3.05

Bad Purpose or Corrupt Motive

[No Instruction Recommended]

COMMITTEE COMMENTARY 3.05

In United States v. Feola, 420 U.S. 671, 686-696, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975), the Supreme Court held that generally speaking, the government need not prove anything more than the degree of criminal intent necessary for the substantive offense in order to convict a defendant of conspiracy. The Court noted in passing that requiring some additional degree of criminal intent beyond that required for the substantive offense would come close to embracing the severely criticized "corrupt motive" doctrine, which in some states requires proof of a motive to do wrong to convict a defendant of conspiracy.

Based on Feola, the Committee recommends that no instruction be given regarding any bad purpose or corrupt motive beyond the degree of criminal intent required for the substantive offense. See generally United States v. Prince, 529 F.2d 1108, 1111-1112 (6th Cir.), cert. denied, 429 U.S. 838 (1976).

3.06

Unindicted, Unnamed or Separately Tried Co-Conspirators

(1) Now, some of the people who may have been involved in these events are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged and prosecuted, or tried together in one proceeding.

[(2) Nor is there any requirement that the names of the other conspirators be known. An indictment can charge a defendant with a conspiracy involving people whose names are not known, as long as the government can prove that the defendant conspired with one or more of them. Whether they are named or not does not matter.]

USE NOTE: This instruction should be used when some of the potential conspirators are not on trial.

Bracketed paragraph (2) should be included when some of the potential conspirators are unnamed.

Instructions 2.01(3) and 8.08(2) further caution the jurors that the possible guilt of others is not a proper matter for their consideration.

COMMITTEE COMMENTARY 3.06

It is "immaterial" that all members of a conspiracy are not charged in an indictment. United States v. Sandy, 605 F.2d 210, 216 (6th Cir.), cert. denied, 444 U.S. 984 (1979). "It is not necessary, to sustain a conviction for a conspiracy, that all co-conspirators be charged." United States v. Sachs, 801 F.2d 839, 845 (6th Cir. 1986).

It is also well-settled that "a valid indictment may charge a defendant with conspiring with persons whose names are unknown." E.g., United States v. Piccolo, 723 F.2d 1234, 1239 (6th Cir. 1983), cert. denied, 466 U.S. 970 (1984). See also United States v. English, 925 F.2d 154, 159 (6th Cir. 1991) (Absent a specific showing of surprise or prejudice, there is no requirement that an indictment or a bill of particulars identify the supervisees necessary for a continuing criminal enterprise conviction). A defendant "may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons." United States v. Rey, 923 F.2d 1217, 1222 (6th Cir. 1991).

3.07

Venue

(1) Now, some of the events that you have heard about happened in other places. There is no requirement that the entire conspiracy take place here in _____. But for you to return a guilty verdict on the conspiracy charge, the government must convince you that either the agreement, or one of the overt acts, took place here in _____.

(2) Unlike all the other elements that I have described, this is just a fact that the government only has to prove by a preponderance of the evidence. This means the government only has to convince you that it is more likely than not that part of the conspiracy took place here.

(3) Remember that all the other elements I have described must be proved beyond a reasonable doubt.

USE NOTE: This instruction should be used when venue is an issue.

COMMITTEE COMMENTARY 3.07

A conspiracy prosecution may be brought in the district where the agreement was made, or in any district where an overt act in furtherance of the conspiracy was committed. E.g., United States v. Miller, 358 F.2d 696, 697 (6th Cir. 1966); Sandroff v. United States, 174 F.2d 1014, 1018-1019 (6th Cir. 1949), cert. denied, 338 U.S. 947 (1950). Unlike true elements, venue is merely a fact that only needs to be proved by a preponderance of the evidence. United States v. Charlton, 372 F.2d 663, 665 (6th Cir.), cert. denied, 387 U.S. 936 (1967). And any objection to venue may be waived if not raised in the district court. United States v. English, 925 F.2d 154, 158 (6th Cir. 1991).

3.08

Multiple Conspiracies--Material Variance From the Indictment

(1) The indictment charges that the defendants were all members of one single conspiracy to commit the crime of _____.

(2) Some of the defendants have argued that there were really two separate conspiracies--one between _____ to commit the crime of _____; and another one between _____ to commit the crime of _____.

(3) To convict any one of the defendants of the conspiracy charge, the government must convince you beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the indictment. If the government fails to prove this, then you must find that defendant not guilty of the conspiracy charge, even if you find that he was a member of some other conspiracy. Proof that a defendant was a member of some other conspiracy is not enough to convict.

(4) But proof that a defendant was a member of some other

conspiracy would not prevent you from returning a guilty verdict, if the government also proved that he was a member of the conspiracy charged in the indictment.

USE NOTE: This instruction should be used when there is some evidence that multiple conspiracies may have existed, and a finding that multiple conspiracies existed would constitute a material variance from the indictment. It should be followed by Instruction 3.09, which explains the factors the jury should consider in determining whether a single or multiple conspiracies existed.

The possible existence of separate conspiracies may require the drafting of special instructions limiting the jury's consideration of statements made by co-conspirators to members of a particular conspiracy.

COMMITTEE COMMENTARY 3.08

This instruction should be used when there is some evidence that multiple conspiracies may have existed, and a finding that multiple conspiracies existed would constitute a material variance from the indictment. See generally Berger v. United States, 295 U.S. 78, 81-82, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) (proof that two or more conspiracies may have existed is not fatal unless there is a material variance that results in substantial prejudice); Kotteakos v. United States, 328 U.S. 750, 773-774, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) (there must be some leeway for conspiracy cases where the evidence differs from the exact specifications in the indictment).

Whether single or multiple conspiracies have been proved is usually a question of fact to be resolved by the jury under proper instructions. See United States v. Schultz, 855 F.2d 1217, 1222 (6th Cir. 1988); United States v. Rios, 842 F.2d 868, 872 (6th Cir. 1988), cert. denied, 488 U.S. 1031 (1989); United States v. Battista, 646 F.2d 237, 243 (6th Cir.), cert. denied, 454 U.S. 1046 (1981); and United States v. Grunsfeld, 558 F.2d 1231, 1238 (6th Cir.), cert. denied, 434 U.S. 872 (1977). When no evidence is presented warranting an instruction on multiple conspiracies, none need be given. United States v. Levinson, 405 F.2d 971, 989 (1968), cert. denied, 395 U.S. 958 (1969). But "when the evidence is such that the jury could within reason find more than one conspiracy, the trial court should give the jury a multiple conspiracy instruction." United States v. Warner, 690 F.2d 545, 551 (6th Cir. 1982). Accord United States v. Davenport, 808 F.2d 1212, 1217 (6th Cir. 1987).

This instruction is patterned after instructions quoted by the Sixth Circuit in United States v. Hughes, 895 F.2d 1135, 1140 n. 6 (6th

Cir. 1990). Where one single conspiracy is charged, "proof of different and disconnected ones will not sustain a conviction." United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973). See also United States v. Borelli, 336 F.2d 376, 382 (2nd Cir. 1964), cert. denied, 379 U.S. 960 (1965).

See generally Fifth Circuit Instruction 2.22, Eighth Circuit Instruction 5.06G, Ninth Circuit Instruction 8.05B, Eleventh Circuit Offense 4.3 and Federal Judicial Center Instruction 64.

This instruction should be followed by Instruction 3.09, which explains the factors the jury should consider in determining whether a single or multiple conspiracies existed.

The possible existence of separate conspiracies may require the drafting of special instructions limiting the jury's consideration of statements made by co-conspirators to members of a particular conspiracy.

3.09

Multiple Conspiracies--Factors in Determining

(1) In deciding whether there was more than one conspiracy, you should concentrate on the nature of the agreement. To prove a single conspiracy, the government must convince you that each of the members agreed to participate in what he knew was a group activity directed toward a common goal. There must be proof of an agreement on an overall objective.

(2) But a single conspiracy may exist even if all the members did not know each other, or never sat down together, or did not know what roles all the other members played. And a single conspiracy may exist even if different members joined at different times, or the membership of the group changed. These are all things that you may consider in deciding whether there was more than one conspiracy, but they are not necessarily controlling.

(3) Similarly, just because there were different sub-groups operating in different places, or many different criminal acts committed over a long period of time, does not necessarily mean that

there was more than one conspiracy. Again, you may consider these things, but they are not necessarily controlling.

(4) What is controlling is whether the government has proved that there was an overall agreement on a common goal. That is the key.

USE NOTE: This instruction should be used with Instruction 3.08. Paragraphs (2) and (3) should be tailored to the facts of the particular case. For example, when there is no evidence that the membership of the group may have changed, that language should be deleted.

COMMITTEE COMMENTARY 3.09

The leading Sixth Circuit case on the factors to be considered in determining whether single or multiple conspiracies existed is United States v. Warner, 690 F.2d 545 (6th Cir. 1982). See United States v. Rios, 842 F.2d 868, 872-873 (6th Cir. 1988), cert. denied, 488 U.S. 1031 (1989); United States v. Davenport, 808 F.2d 1212, 1215-1216 (6th Cir. 1987); and United States v. McLernon, 746 F.2d 1098, 1107-1108 (6th Cir. 1984), all citing and quoting Warner extensively with approval. In Warner, the Sixth Circuit generally described the principles governing the resolution of whether single or multiple conspiracies existed as follows:

> "In determining whether the evidence showed single or multiple conspiracies, we must bear in mind that the essence of the crime of conspiracy is agreement. '[I]n order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal'." Id. at 548-549.

In United States v. Sutton, 642 F.2d 1001, 1017 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981), the Sixth Circuit similarly stated that "[t]o find a single conspiracy, we . . . must look for agreement on an overall objective." See also United States v. Mayes, 512 F.2d 637, 643 (6th Cir.) ("essential continuity and singleness of purpose"), cert. denied, 422 U.S. 1008 (1975); United States v. Vida, 370 F.2d 759, 767 (6th Cir. 1966) ("one broad and continuing endeavor"), cert. denied, 387 U.S. 910 (1967).

In Warner, the Sixth Circuit also dealt with a number of subsidiary issues relating to this subject. With regard to the proof of an agreement, the Sixth Circuit stated that the government is not required to prove "an actual agreement among the various conspirators" in order to establish a single conspiracy. Id. at 549. See also

United States v. Butler, 618 F.2d 411, 416 (6th Cir.) ("the law does not require that all conspirators be physically present at the moment agreement is reached . . . [a]greement among conspirators may take place seriatim"), cert. denied, 447 U.S. 927 (1980); United States v. Perry, 550 F.2d 524, 533 (5th Cir.) ("The government does not have to prove that all of the defendants met together at the same time and ratified the agreement."), cert. denied, 434 U.S. 827 (1977).

With regard to knowledge of the other members of the conspiracy and the activities they performed, the Sixth Circuit stated in Warner that "a single conspiracy does not become multiple conspiracies simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy." Id. at 549. See also United States v. Mayes, supra, 512 F.2d at 642 ("it is common for willing participants not to be acquainted with all of the members of the organization, or even to know the nature of every aspect of the operation").

With regard to changes in membership, the Sixth Circuit stated in Warner that "[n]ew parties may join the agreement at any time while others may terminate their relationship . . . . [t]he parties are not always identical, but this does not mean that there are separate conspiracies." Id. at 549 n. 7. See also United States v. Rios, supra, 842 F.2d at 873 ("a single conspiracy does not become multiple conspiracies simply because of personnel changes or because its members are cast in different roles"); United States v. Vida, supra, 370 F.2d at 767 (finding a single conspiracy even though "[i]ndividual defendants were entering and leaving the operation as it continued its course").

Related to this, it is "not necessary that each member of the

conspiracy be a member of it from the beginning so long as each joins it while it is still in operation." United States v. Stephens, 492 F.2d 1367, 1373 (6th Cir.), cert. denied, 419 U.S. 852 (1974). Accord United States v. Warner, supra, 690 F.2d at 549 n. 7 ("The fact that [some of the defendants] entered the conspiracy relatively late does not preclude our finding that they were part of the single conspiracy alleged in the indictment."). "All with criminal intent who join themselves . . . to the principal scheme are subject to the statute, although they were not parties to the scheme at its inception." Blue v. United States, 138 F.2d 351, 359 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944).

In United States v. Warner, supra, 690 F.2d at 550 n. 8, the Sixth Circuit also stated that just because a conspiracy can be divided into "distinct sub-groups" does not mean that there is more than one conspiracy. "As long as the different sub-groups are committing acts in furtherance of one overall plan, the jury can still find a single, continuing conspiracy." Id. See also United States v. Cambindo Valencia, 609 F.2d 603, 624 (2nd Cir. 1979) ("mere territorial separation . . . . does not necessarily establish discrete conspiracies"), cert. denied, 446 U.S. 940 (1980).

In United States v. Mayes, supra, 512 F.2d at 642, the Sixth Circuit stated that just because a conspiracy "continued over a long period of time and contemplated the commission of many illegal acts [does not] transform the single conspiracy into several conspiracies." As stated by the Supreme Court in Braverman v. United States, 317 U.S. 49, 52, 63 S. Ct. 99, 87 L. Ed. 23 (1942), "a single agreement to commit an offense does not become several conspiracies because it continues over a period of time . . . . [t]here may be such a single continuing agreement to commit several offenses." In Braverman, the

Supreme Court also stated that "one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." See also United States v. Hughes, 895 F.2d 1135, 1140 (6th Cir. 1990) (a conspirator need not have agreed to commit every crime within the scope of the conspiracy so long as it is reasonable to infer that each crime was intended to further the enterprise's affairs, and it is not necessary for each conspirator to participate in every phase of the criminal venture provided there is assent to contribute to a common enterprise).

In United States v. Warner, supra, 690 F.2d at 549-550, the defendant argued that the evidence presented at his trial showed at least two separate drug distribution conspiracies instead of the single conspiracy alleged in the indictment. The Sixth Circuit rejected this argument, in part on the ground that in so-called "chain" conspiracies, a single agreement "can be inferred from the interdependent nature of the criminal enterprise." The Sixth Circuit explained that "[b]ecause the success of participants on each level of distribution is dependent upon the existence of other levels of distribution, each member of the conspiracy must realize that he is participating in a joint enterprise." Applying these principles to the facts of the case, the Sixth Circuit stated that "the evidence shows that the two groups of dealers were dependent upon one another for their success, a factor which indicates that they were a part of a single conspiracy."

In Kotteakos v. United States, 328 U.S. 750, 754-755, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), the Supreme Court held that the commission of similar crimes by the alleged conspirators and their connection to a common "hub" was not sufficient to establish a single conspiracy. Where none of the alleged conspirators benefit from the others' participation, like "separate spokes meeting in a common center," but

"without the rim of the wheel to enclose the spokes," there are multiple, not single conspiracies, even if the "spokes" and the "hub" commit similar criminal acts. The government must show that there was a "single enterprise," not "several, though similar . . . separate adventures of like character." Id. at 768-769. See also United States v. Sutherland, 656 F.2d 1181, 1190 (5th Cir. 1981) (absent evidence that the spokes were dependent on or benefited from each others' participation, or that there was some interaction between them, government's proofs were insufficient to establish a single conspiracy), cert. denied, 455 U.S. 949 (1982).

The Committee believes that the concepts of mutual dependence and "chain" vs. "hub" conspiracies are more appropriate for arguments by counsel than for instructions by the court.

In United States v. Castro, 908 F.2d 85, 88 (6th Cir. 1990), the Sixth Circuit stated that in drug trafficking conspiracies, "importers, wholesalers, purchasers of cutting materials, and persons who 'wash' money are all as necessary to the success of the venture as the retailer." For this reason, the Sixth Circuit refused to find that evidence of currency collections connected with the drug trafficking at issue constituted a material variance from the charged conspiracy, particularly in light of additional evidence of the defendants' knowledge and intent. Cf. United States v. Todd, 920 F.2d 399, 406 (6th Cir. 1990) (Money-laundering is integrally related to the success of a drug distribution conspiracy, but there must be a "sufficient link" between a defendant's money-laundering activities and the drug distribution conspiracy to convict the defendant of the conspiracy.)

3.10

Pinkerton Liability for Substantive Offenses Committed by Others

(1) Count _____ of the indictment accuses the defendants of committing the crime of _____.

(2) There are two ways that the government can prove the defendants guilty of this crime. The first is by convincing you that they personally committed or participated in this crime. The second is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement.

(3) In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by only one of them, even though they did not all personally participate in that crime themselves.

(4) But for you to find any one of the defendants guilty of _____ based on this legal rule, you must

be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant was a member of the conspiracy charged in Count _____ of the indictment.

(B) Second, that after he joined the conspiracy, and while he was still a member of it, one or more of the other members committed the crime of _____.

(C) Third, that this crime was committed to help advance the conspiracy.

(D) And fourth, that this crime was within the reasonably foreseeable scope of the unlawful project. The crime must have been one that the defendant could have reasonably anticipated as a necessary or natural consequence of the agreement.

(5) This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understood it.

(6) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of them, then the legal rule that the act of one conspirator is the act of all would not apply.

USE NOTE: This instruction should be used when the government is attempting to convict a defendant of a substantive crime committed by other members of a conspiracy, and there is also some evidence that the defendant personally committed or participated in the commission of the substantive offense.

The language in paragraph (2) should be modified to delete all references to personal commission or participation when only one defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

COMMITTEE COMMENTARY 3.10

This instruction is designed for use when there is some evidence that would support a conviction based on a co-conspirator liability theory, and some evidence that a defendant personally committed or participated in a substantive offense.

In Pinkerton v. United States, 328 U.S. 640, 645-648, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), the Supreme Court held that even though there was no evidence that one of two conspirators participated directly in the commission of the substantive offenses charged in the indictment, that conspirator could still be convicted of the substantive offenses based on the principle that the "act of one partner [committed in furtherance of the conspiracy] may be the act of all." Accord United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990) ("The Pinkerton doctrine permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy."); United States v. Adamo, 742 F.2d 927, 943-944 (6th Cir. 1984) ("Once a person becomes a member of a conspiracy, he or she may 'be held responsible for all that may be . . . done' by co-conspirators."), cert. denied, 469 U.S. 1193 (1985); United States v. Chambers, 382 F.2d 910, 914 (6th Cir. 1967)) ("Where the substantive offense is committed by one or more conspirators in furtherance of an unlawful activity, all members of the conspiracy are guilty of the substantive offense.").

The instruction requires the prosecution to prove that the substantive offense was committed after the defendant joined the conspiracy, and while he was still a member of it. Although there is some authority for the proposition that a person who joins a conspiracy may be held responsible for acts committed before he joined it, see,

e.g., United States v. Cimini, 427 F.2d 129, 130 (6th Cir.), cert. denied, 400 U.S. 911 (1970), that authority is questionable in light of the United States Supreme Court's decision in Levine v. United States, 383 U.S. 265, 266-267, 86 S. Ct. 925, 15 L. Ed. 2d 737 (1966). In Levine, the Supreme Court accepted the Solicitor General's concession that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy."

The Supreme Court has indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of . . . the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." Pinkerton, supra, 328 U.S. at 647-648. In United States v. Etheridge, 424 F.2d 951, 965 (6th Cir. 1970), cert. denied, 400 U.S. 1000 (1971), the Sixth Circuit treated this statement from Pinkerton as creating three separate limitations on the rule that the act of one co-conspirator is the act of all, and Instruction 3.10 does the same. Cf. United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990) ("[A] court need not inquire into the individual culpability of a particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy.")

In Pinkerton, the Supreme Court stated that the act of one co-conspirator may be the act of all "without any new agreement specifically directed to that act." Id., 328 U.S. at 646-647. And in Etheridge, the Sixth Circuit held that even though a defendant had no knowledge of a particular substantive offense, he could still be convicted of that offense if it was "within the reasonable

contemplation of those who formulated and participated" in the conspiracy. Id., 424 F.2d at 965.

In United States v. Borelli, 336 F.2d 376, 385-386 (2nd Cir. 1964), cert. denied, 379 U.S. 960 (1965), the Second Circuit held that when the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance to the case, a special instruction should be given focusing the jury's attention on this issue. Quoting from United States v. Peoni, 100 F.2d 401, 403 (2nd Cir. 1938), the Second Circuit stated that "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it". See also United States v. United States Gypsum Co, 438 U.S. 422, 463 n. 36, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978) (quoting a similar requested instruction, and stating that the district court's actual instructions differed in only "minor and immaterial" respects).

When only a single defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense, the language in paragraph (2) should be modified to delete all references to personal commission or participation.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

3.11A

Withdrawal as a Defense to Conspiracy

(1) One of the defendants, _____, has raised the defense that he withdrew from the agreement before any overt act was committed. Withdrawal can be a defense to a conspiracy charge. But _____ has the burden of proving to you that he did in fact withdraw.

(2) To prove this defense, _____ must prove each and every one of the following things:

(A) First, that he completely withdrew from the agreement. A partial or temporary withdrawal is not enough.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. This would include things like voluntarily going to the police or other law enforcement officials and telling them about the plan; or telling the other members of the conspiracy that he did not want to have anything more to do with it; or any other affirmative acts that are inconsistent with the purpose of the conspiracy, and that are communicated in a way that is reasonably

likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members of the group, would not be enough.

(C) The third thing that _____ must prove is that he withdrew before any member of the group committed one of the overt acts described in the indictment. Once an overt act is committed, the crime of conspiracy is complete. And any withdrawal after that point is no defense to the conspiracy charge.

(3) The fact that _____ has raised this defense does not relieve the government of its burden of proving that there was an agreement, that he knowingly and voluntarily joined it, and that an overt act was committed. Those are still things that the government must prove in order for you to find _____ guilty of the

conspiracy charge.

USE NOTE: This instruction should be used when there is some evidence that a defendant withdrew before any overt act was committed, and withdrawal has been raised as a defense to the conspiracy charge itself.

This instruction does not appear to be appropriate when the conspiracy charged does not require proof of an overt act.

COMMITTEE COMMENTARY 3.11A

This instruction should be used when there is some evidence that a defendant withdrew before any overt act was committed, and withdrawal has been raised as a defense to the conspiracy charge itself. Some conspiracies do not require the commission of an overt act in order for the conspiracy to be complete. See for example 21 U.S.C. § 846. In such cases, once a defendant joins the conspiracy, the concept of withdrawal as a defense to the conspiracy charge "would appear to be inapplicable." See the Committee Commentary to Federal Judicial Center Instruction 63.

In the Sixth Circuit, the members of a conspiracy "continue to be co-conspirators until there has been an affirmative showing that they have withdrawn." E.g., United States v. Mayes, 512 F.2d 637, 642-643 (6th Cir.), cert. denied, 422 U.S. 1008 (1975). Withdrawal remains a strict affirmative defense that the defendant must prove. Chiropractic Cooperative Association of Michigan v. American Medial Association, 867 F.2d 270, 274-275 (6th Cir. 1989); United States v. McLernon, 746 F.2d 1098, 1114 (6th Cir. 1984); United States v. Hamilton, 689 F.2d 1262, 1268-1269 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); United States v. Battista, 646 F.2d 237, 246 (6th Cir. 1980), cert. denied, 454 U.S. 1046 (1981); Blue v. United States, 138 F.2d 351, 360 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944). But see the Seventh Circuit's decision in United States v. Read, 658 F.2d 1225, 1236 (7th Cir. 1981) (overruling prior decisions and holding that once a defendant comes forward with some evidence of withdrawal, the burden of persuasion is on the government to disprove withdrawal beyond a reasonable doubt). See also Ninth Circuit Instruction 8.05D ("The government has the burden of proving that the defendant did not

withdraw from the conspiracy"), and Federal Judicial Center Instruction 63 ("So you may find _____ guilty only if the government has proved beyond a reasonable doubt that he was a member of the conspiracy at the time an overt act was committed").

The standard of proof that the defendant must meet to carry his burden has not been delineated.

A partial withdrawal is not sufficient to establish this defense. See United States v. Battista, supra, 646 F.2d at 246 (quoting instruction that the defendant must "completely" disassociate himself from the conspiracy). And some "affirmative action to disavow or defeat the purposes of the conspiracy" is required. Id. Accord United States v. Edgecomb, 910 F.2d 1309, 1312 (6th Cir. 1990). Mere cessation of activity, or termination of one's relationship with the other co-conspirators, is not enough. See United States v. Adamo, 742 F.2d 927, 943-944 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States v. Wirsing, 719 F.2d 859, 862 n. 5 (6th Cir. 1983); United States v. Borelli, 336 F.2d 376, 388 (2nd Cir. 1964), cert. denied, 379 U.S. 960 (1965).

Jury instructions quoted or approved in the decided cases commonly include examples of the kinds of affirmative steps considered sufficient to constitute a withdrawal. See for example, United States v. United States Gypsum Co, 438 U.S. 422, 463-464, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978); United States v. Battista, supra, 646 F.2d at 246. See also Seventh Circuit Instruction 5.12. These examples include such things as notifying the authorities, or effectively communicating the withdrawal to the other members of the conspiracy. See Battista, supra at 246 (quoted instruction containing these two examples "was in accord with the law of this circuit"). But in United States Gypsum Co., the Supreme Court held that jury instructions which

limited the ways in which a defendant could withdraw to either informing the authorities, or notifying the other members of the conspiracy of an intention to withdraw, constituted reversible error. The Court stated that other affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach the other co-conspirators have generally been regarded as sufficient to establish withdrawal. Id. at 463-464.

The final paragraph of this instruction is designed to remind the jury that the government retains the burden of proving the basic elements of conspiracy even though the defendant has raised withdrawal as an affirmative defense.

3.11B

Withdrawal as a Defense to Substantive Offenses

Committed by Others

(1) One of the defendants, _____, has raised the defense that he withdrew from the conspiracy before the crime of _____ was committed. Withdrawal can be a defense to a crime committed after the withdrawl. But _____ has the burden of proving to you that he did in fact withdraw.

(2) To prove this defense, _____ must prove each and every one of the following things:

(A) First, that he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. This would include things like voluntarily going to the police or other law enforcement officials and telling them about the plan; or telling the other members of the conspiracy that he did not want to have anything more to do with it; or any other affirmative acts that are inconsistent with the purpose of

the conspiracy, and that are communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members, would not be enough.

(C) The third thing that _____ must prove is that he withdrew before the crime of _____ was committed. Once that crime was committed, any withdrawal after that point would not be a defense.

(3) Withdrawal is not a defense to the conspiracy charge itself. But the fact that _____ has raised this defense does not relieve the government of proving that there was an agreement, that he knowingly and voluntarily joined it, that an overt act was committed, that the crime of _____ was committed to help advance the conspiracy and that this crime was within the reasonably foreseeable scope of the unlawful project. Those are still things that the government must prove in order for you to find _____ guilty of_____.

USE NOTE: This instruction should be used when the evidence shows that any withdrawal came after an overt act was committed, and withdrawal has been raised as a defense to a

substantive offense committed by another member of the conspiracy.

COMMITTEE COMMENTARY 3.11B

This instruction should be used when the evidence shows that any withdrawal came after the conspiracy was completed by the commission of an overt act, and a defendant is raising withdrawal as a defense to a substantive offense committed by a fellow co-conspirator. See Instruction 3.10 on Pinkerton liability.

See the Committee Commentary to Instruction 3.11A for a complete discussion of the law of withdrawal.

3.11C

Withdrawal as a Defense to Conspiracy

Based on the Statute of Limitations

(1) One of the defendants, _____, has raised the defense that he withdrew from the conspiracy before _____, and that the statute of limitations ran out before the government obtained an indictment charging him with the conspiracy.

(2) The statute of limitations is a law that puts a limit on how much time the government has to obtain an indictment. This can be a defense, but _____ has the burden of proving to you that he did in fact withdraw, and that he did so before _____.

(3) To prove this defense, _____ must establish each and every one of the following things:

(A) First, that he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. This would include things like

voluntarily going to the police or other law enforcement officials and telling them about the plan; or telling the other members of the conspiracy that he did not want to have anything more to do with it; or any other affirmative acts that are inconsistent with the purpose of the conspiracy, and that are communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding contact with the other members, would not be enough.

(C) The third thing that _____ must prove is that he withdrew before _____.

(4) The fact that _____ has raised this defense does not relieve the government of its burden of proving that there was an agreement, that he knowingly and voluntarily joined it, and that an overt act was committed. Those are still things that the government must prove in order for you to find _____ guilty of the conspiracy charge.

USE NOTE: This instruction should be used when there is some evidence that a defendant withdrew from a conspiracy more than five years before the date of the indictment.

COMMITTEE COMMENTARY 3.11C

This instruction should be used when there is some evidence that a defendant withdrew from the conspiracy more than five years before the date of the indictment.

Generally speaking, the statute of limitations for prosecutions under 18 U.S.C. § 371 is five years from the date of the last overt act committed in furtherance of the conspiracy. See United States v. Zalman, 870 F.2d 1047, 1057 (6th Cir.), cert. denied, ____ U.S. ____, 109 S.Ct. 3248, 106 L.Ed.2d 594 (1989). But a defendant's withdrawal from a conspiracy starts the statute of limitations running as to him. See Chiropractic Cooperative Association of Michigan v. American Medical Association, 867 F.2d 270, 272-275 (6th Cir. 1989) (a claimed withdrawal before the applicable statute of limitations period presents a question of fact that should not be resolved by way of summary judgment). See also Hyde v. United States, 225 U.S. 347, 368-370, 32 S. Ct. 793, 56 L. Ed. 1114 (1912) (implicitly recognizing that the statute of limitations begins to run as soon as there has been an affirmative act of withdrawal); United States v. Read, 658 F.2d 1225, 1233 (7th Cir. 1981) ("A defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him. If the indictment is filed more than five years after a defendant withdraws, the statute of limitations bars prosecution for . . . the conspiracy."). Without explanation, the Seventh Circuit recommends that no instruction be given on this subject. See Seventh Circuit Instruction 5.13.

See the Committee Commentary to Instruction 3.11A for a complete discussion of the law relating to withdrawal.

3.12

Duration of a Conspiracy

(1) One of the questions in this case is whether _____. This raises the related question of when a conspiracy comes to an end.

(2) A conspiracy ends when its goals have been achieved. But sometimes a conspiracy may have a continuing purpose, and may be treated as an ongoing, or continuing, conspiracy. This depends on the scope of the agreement.

(3) If the agreement includes an understanding that the conspiracy will continue over time, then the conspiracy may be a continuing one. And if it is, it lasts until there is some affirmative showing that it has ended. On the other hand, if the agreement does not include any understanding that the conspiracy will continue, then it comes to an end when its goals have been achieved. This, of course, is all for you to decide.

USE NOTE: This instruction should be used when an issue relating to the duration of a conspiracy has been raised.

COMMITTEE COMMENTARY 3.12

The duration of a conspiracy may be relevant to various issues that a jury may have to decide. These include: statute of limitations issues, see Instruction 3.04(4); single vs. multiple conspiracy issues, see Instructions 3.08 and 3.09; and whether co-conspirators are responsible for substantive offenses committed by other members of the conspiracy, see Instruction 3.10(4)(B). Conspiracy is a continuing crime which is not completed at the conclusion of the agreement. United States v. Edgecomb, 910 F.2d 1309, 1312 (6th Cir. 1990).

The language of this instruction is based on the Sixth Circuit's decisions in United States v. Hamilton, 689 F.2d 1262, 1268 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); United States v. Mayes, 512 F.2d 637, 642 (6th Cir.), cert. denied, 422 U.S. 1008 (1975); and United States v. Etheridge, 424 F.2d 951, 964 (6th Cir. 1970), cert. denied, 400 U.S. 1000 (1971).

3.13

Impossibility of Success

(1) One last point about conspiracy. It is no defense to a conspiracy charge that success was impossible because of circumstances that the defendants did not know about. This means that you may find the defendants guilty of conspiracy even if it was impossible for them to successfully complete the crime that they agreed to commit.

USE NOTE: This instruction should be used when impossibility of success has been raised as an issue.

COMMITTEE COMMENTARY 3.13

In United States v. Hamilton, 689 F.2d 1262, 1269 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983), the Sixth Circuit rejected the defendants' argument that statements made to a co-conspirator who had become a government agent were not made in furtherance of the conspiracy. The Sixth Circuit held that such statements are admissible even when the conspirator to whom the statements were made was acting under the direction and surveillance of government agents. The Sixth Circuit then buttressed this holding by reference to "the principle that 'it is no defense that success was impossible because of unknown circumstances'." But Cf. United States v. Howard, 752 F.2d 220, 229 (6th Cir. 1985) ("A conspiracy is deemed to have ended when . . . achievement of the objective has . . . been rendered impossible.").

3.14

Statements by Co-Conspirators

[No Instruction Recommended]

COMMITTEE COMMENTARY 3.14

The rule in the Sixth Circuit is that the trial judge alone is responsible for deciding whether statements by co-conspirators are admissible, and that the question of admissibility should not be submitted to the jury. E.g., United States v. Mitchell, 556 F.2d 371, 377 (6th Cir.), cert. denied, 434 U.S. 925 (1977). Instructions that the jury may only consider a co-conspirator's statement if the jury first finds that a conspiracy existed and that the defendant was a member of it have repeatedly been held to be "altogether unnecessary." E.g., United States v. Enright, 579 F.2d 980, 986-987 (6th Cir. 1978). Accord, United States v. Swidan, 888 F.2d 1076, 1081 (6th Cir. 1989). The judge should not advise the jury of the government's burden of proof on the preliminary question of admissibility, or the judge's determination that the government has met its burden. United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980). Instead, the judge should admit the statements, subject only to instructions on the government's ultimate burden of proof beyond a reasonable doubt, and on the weight and credibility to be given statements by co-conspirators. Id.

Special instructions limiting the consideration of statements made by co-conspirators may be required when the evidence would support a finding that multiple conspiracies existed. See Use Note and Committee Commentary to Instruction 3.08.

Table of Cotents

Chapter 4.00

Aiding And Abetting

4.01

Aiding and Abetting

(1) For you to find _____ guilty of _____, it is not necessary for you to find that he personally committed the crime himself. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of _____ as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of _____ was committed.

(B) Second, that the defendant helped to commit the crime [or encouraged someone else to commit the crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime.

(3) Proof that the defendant may have known about the crime, even

if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

(4) What the government must prove is that the defendant did something to help [or encourage] the crime with the intent that the crime be committed.

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of _____ as an aider and abettor.

USE NOTE: The bracketed language in paragraphs (1), (2)(B), (2)(C) and (3) should be included when there is evidence that the defendant counseled, commanded, induced or procured the commission of the crime.

COMMITTEE COMMENTARY 4.01

18 U.S.C. §2 provides:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
>
> Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Aiding and abetting is a method of making a co-defendant equally culpable when another defendant actually carried out the substantive offense. A defendant need not be specifically charged with aiding and abetting to be convicted under 18 U.S.C. §2, but can be charged as a principal and convicted as an aider and abettor. Standefer v. United States, 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980).

In order to aid and abet, one must do more than merely be present at the scene of the crime and have knowledge of its commission. The Supreme Court set out the standard for the offense in Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1948), when it quoted Judge Learned Hand's statement from United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938):

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'."

Accord United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990); United States v. Quinn, 901 F.2d 522, 530 n.6 (6th Cir. 1990).

This requires proof of something more than mere association with a criminal venture. United States v. Morrow, 923 F.2d 427, 436 (6th

Cir. 1991). The government must prove "some active participation or encouragement, or some affirmative act by [the defendant] designed to further the [crime]." Id.

The defendant must act or fail to act with the intent to help the commission of a crime by another. Simple knowledge that a crime is being committed, even when coupled with presence at the scene, is usually not enough to constitute aiding and abetting. United States v. Luxenberg, 374 F.2d 241, 249-50 (6th Cir. 1950). Because of its importance in determining whether the accused is an accomplice, the jury must be charged fully and accurately as to intent. The failure to instruct on intent constitutes plain error. United States v. Bryant, 461 F. 2d 912 (6th Cir. 1972).

Although the defendant must be a participant rather than merely a knowing spectator before he can be convicted as an aider and abettor, it is not necessary for the governments to prove that he had an interest or stake in the transaction. United States v. Winston, 687 F.2d 832, 834 (6th Cir. 1982).

See generally Fifth Circuit Instruction 2.06, Seventh Circuit Instruction 5.08, Eighth Circuit Instruction 5.01, Ninth Circuit Instruction 5.01 and Eleventh Circuit Special Instruction 6.

4.02

Accessory After the Fact

(1) _____ is not charged with actually committing the crime of _____. Instead, he is charged with helping someone else try to avoid being arrested, prosecuted or punished for that crime. A person who does this is called an accessory after the fact.

(2) For you to find _____ guilty of being an accessory after the fact, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knew someone else had already committed the crime of _____.

(B) Second, that the defendant then helped that person try to avoid being arrested, prosecuted or punished.

(C) And third, that the defendant did so with the intent to help that person avoid being arrested, prosecuted or punished.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge.

If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

COMMITTEE COMMENTARY 4.02

18 U.S.C. §3 provides:

> "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.
>
> Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than ten years."

A defendant is guilty under Section 3 where he knowingly assists an offender in order to hinder the offender's apprehension, trial or punishment. He is distinguished from an aider and abettor by not being entangled in the commission of the crime itself. For example, the driver of a getaway car in a bank robbery may be treated as a principal, while a defendant who learns about a crime afterwards and then supplies a place of refuge would be an accessory after the fact. It is important that the felony not be in progress when assistance is rendered in order for the person to be treated as an accessory after the fact, rather than as a principal.

> "The gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime . . . The very definition of the crime also requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense and be guilty as a principal." United States v. Barlow, 470 F.2d 1245, 1252-1253 (D.C. Cir. 1972).

The line between an aider and abettor and an accessory after the

fact is sometimes difficult to draw, particularly when dealing with the escape immediately following the crime. The defendant in United States v. Martin, 749 F.2d 1514, 1518 (11th Cir. 1985), was convicted of aiding and abetting in a bank robbery under an instruction in which the jury was told that the robbery was not complete as long as the money was being "asported or transported." The Eleventh Circuit held that the instructions extended the crime too far since "the money could be transported long after the possibility of hot pursuit had ended."

See generally Fifth Circuit Instruction 2.07, Seventh Circuit Instruction 5.09 and Ninth Circuit Instruction 5.02.

Chapter 5.00

Attempts

5.01

Attempt--Basic Elements

(1) Count _____ of the indictment accuses the defendant of attempting to commit the crime of _____ in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved both of the following elements beyond a reasonable doubt:

(A) First, that the defendant intended to commit the crime of _____.

(B) And second, that the defendant did some overt act that was a substantial step towards committing the crime of _____.

(C) Merely preparing to commit a crime is not a substantial step. The defendant's conduct must go beyond mere preparation, and must strongly confirm that he intended to _____. But the government does not have to prove that the defendant did

everything except the last act necessary to complete the crime. A substantial step beyond mere preparation is enough.

(2) If you are convinced that the government has proved both of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about either one of these elements, then you must find the defendant not guilty.

COMMITTEE COMMENTARY 5.01

There is no general federal statute prohibiting attempts. United States v. Rovetuso, 768 F.2d 809, 821 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986). But many federal statutes defining substantive crimes include express provisions proscribing an attempt to commit the substantive offense. See for example 18 U.S.C. §2113, which expressly prohibits an attempted bank robbery as well as a completed robbery. In United States v. Williams, 704 F.2d 315 (6th Cir.), cert. denied, 464 U.S. 991 (1983), the Sixth Circuit generally defined the two requisite elements of an attempt as: "(1) an intent to engage in criminal conduct and (2) the performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense." Id. at 321. Accord United States v. Pennyman, 889 F.2d 104, 106 (6th Cir. 1989) ("the government must establish two essential elements: (1) the intent to engage in the proscribed criminal activity, and (2) the commission of an overt act which constitutes a substantial step towards commission of the proscribed criminal activity"). See also Ninth Circuit Instruction 5.03.

The main case cited by the Sixth Circuit in Williams in support of this general definition was the Second Circuit's decision in United States v. Manley, 632 F.2d 978 (2nd Cir. 1980), cert. denied, 449 U.S. 1112 (1981). In Manley, the Second Circuit said that the "substantial step" required to convict must be "something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime." Id. at 987. The Second Circuit said that the defendant's behavior must be of such a nature that "a reasonable observer viewing it in the context could conclude

beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute." Id. at 988.

The second case cited by the Sixth Circuit in Williams in support of this general definition was the Fifth Circuit's decision in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). In Mandujano, the Fifth Circuit approvingly quoted instructions stating that the "substantial step" required to convict must be "conduct strongly corroborative of the firmness of the defendant's criminal intent." Id. at 376. This language is consistent with the criminal attempt provisions of the Model Penal Code, from which the "substantial step" test was taken. See Model Penal Code §5.01(2) ("[c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose").

See generally Seventh Circuit Instruction 5.10, Eighth Circuit Instruction 8.01 and Ninth Circuit Instruction 5.03.

5.02

Sham Controlled Substance Cases

(1) The fact that the substance involved in this case was not real _____ is no defense to the attempt charge. But the government must convince you that the defendant actually thought he was buying [selling] real _____.

(2) The government must show that the defendant's actions uniquely marked his conduct as criminal. In other words, the defendant's conduct, taken as a whole, must clearly confirm beyond a reasonable doubt that he actually thought he was buying [selling] real _____.

USE NOTE: This instruction should be used when the defendant is charged with a controlled substances offense based on a sale or purchase of fake drugs.

COMMITTEE COMMENTARY 5.02

In United States v. Pennell, 737 F.2d 521, 524-525 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), the Sixth Circuit held that the defendant could be convicted of an attempt to possess a controlled substance even though the substance he purchased from government agents was not real cocaine. The Sixth Circuit agreed with the Third Circuit's analysis in United States v. Everett, 700 F.2d 900, 907-908 (3rd Cir. 1983), that "Congress intended to eliminate the impossibility defense in cases prosecuted under 21 U.S.C. §§841(a)(1) and 846." Pennell, supra at 525. Accord United States v. Reeves, 794 F.2d 1101, 1104 (6th Cir.) ("there can be no question that the Congressional intent in fashioning the attempt provision as part of an all-out effort to reach all acts and activities related to the drug traffic was all inclusive and calculated to eliminate technical obstacles confronting law enforcement officials"), cert. denied, 479 U.S. 963 (1986).

To convict a defendant in a sham delivery case, the government "must, of course, prove the defendant's subjective intent to purchase (or sell) actual narcotics beyond a reasonable doubt." United States v. Pennell, supra, 737 F.2d at 525. And in order to avoid unjust attempt convictions in these types of cases, the Sixth Circuit has held that the following evidentiary standard must be met:

> "In order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, [must] mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law." Id.

Accord, United States v. Reeves, supra, 794 F.2d at 1104 ("[t]his standard of proof has been adopted in this circuit").

What this means is that "the defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to purchase or sell actual narcotics." United States v. Pennell, supra, 737 F.2d at 525. Accord United States v. Pennyman, supra, 889 F.2d at 106.

5.03

Abandonment or Renunciation

[No Instruction Recommended]

COMMITTEE COMMENTARY 5.03

No federal cases have explicitly recognized voluntary abandonment or renunciation as a valid defense to an attempt charge. The closest the federal courts have come are two cases which assumed, without deciding, that even if abandonment or renunciation is a defense, the facts of the particular cases did not support a finding that a voluntary abandonment or renunciation had occurred. See United States v. Bailey, 834 F.2d 218, 226-227 (1st Cir. 1987); and United States v. McDowell, 705 F.2d 426, 428 (11th Cir. 1983). See generally Model Penal Code §5.01(4).

Given the lack of clear caselaw supporting the existence of this defense, the Committee does not recommend any instruction on this point.

Chapter 6.00

Defenses

6.01

Defense Theory

(1) That concludes the part of my instructions explaining the elements of the crime. Next I will explain the defendant's position.

(2) The defense says _____

_____

_____ .

COMMITTEE COMMENTARY 6.01

When a defense theory finds some support in the evidence and the law, the defendant is entitled to some mention of that theory in the district court's instructions. United States v. Duncan, 850 F.2d 1104, 1117 (6th Cir. 1988), United States v. Garner, 529 F.2d 962, 970 (6th Cir.), cert. denied, 429 U.S. 850 (1976). The test for determining whether some mention of the defense theory must be included is not whether the evidence presented in support of the theory appears reasonable. Duncan, supra at 1117. "It is not for the judge, but rather for the jury, to 'appraise the reasonableness or the unreasonableness of the evidence' relating to the [defense] theory." Id. Instead, the test is whether "there is 'any foundation in the evidence' sufficient to bring the issue into the case, even if that evidence is 'weak, insufficient, inconsistent, or of doubtful credibility'." Id. Accord Garner, supra at 970.

But the district court does not have to accept the exact language of a proffered instruction on the defense theory. United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985); United States v. Blane, 375 F.2d 249, 252 (6th Cir.), cert. denied, 389 U.S. 835 (1967). It is sufficient if the court's instructions, as a whole, adequately cover the defense theory. Blane, supra at 252. As stated by the Sixth Circuit in McGuire:

> "A criminal defendant has no right to select the particular wording of a proposed jury instruction. As long as the instruction actually given is a correct statement of the law, fairly presents the issues to the jury, and is substantially similar to the defendant's proposed instruction, the district court has great latitude in phrasing it." Id. at 1201.

The defense theory must, however, be stated "clearly and

completely." Smith v. United States, 230 F.2d 935, 939 (6th Cir. 1956).

See generally the Committee Comment to Eighth Circuit Instruction 4.00, the Introductory Comment to the Ninth Circuit's Specific Defenses Chapter 6.00 and Devitt and Blackmar Instruction 13.07.

6.02

Alibi

(1) One of the questions in this case is whether the defendant was present _____

_____ .

(2) The government has the burden of proving that the defendant was present at that time and place. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty.

COMMITTEE COMMENTARY 6.02

If requested, an alibi instruction is required when the nature of the offense charged requires the defendant's presence at a particular place or time, and the alibi tends to show his presence elsewhere at all such times. United States v. Dye, 508 F.2d 1226, 1231 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975).

The instruction must tell the jurors that the government has the burden of proof and must meet the reasonable doubt standard concerning the defendant's presence at the relevant time and place. "The defense can easily backfire, resulting in a conviction because the jury didn't believe the alibi rather than because the government has satisfied the jury of the defendant's guilt beyond a reasonable doubt, and it is the trial judge's responsibility to avoid this possibility." United States v. Robinson, 602 F.2d 760, 762 (6th Cir.), cert. denied, 444 U.S. 878 (1979). Failure to give the instruction when appropriate evidence has been presented is plain error. United States v. Hamilton, 684 F.2d 380, 385 (6th Cir.), cert. denied, 459 U.S. 976 (1982).

The use of "on or about" instructions may pose special problems in alibi cases. See Committee Commentary 2.04 and, in particular, United States v. Neuroth, 809 F.2d 339, 341-342 (6th Cir.) (en banc), cert. denied, 482 U.S. 916 (1987).

See generally Fifth Circuit Instruction 1.34, Seventh Circuit Instruction 4.03, Eighth Circuit Instruction 9.07, Ninth Circuit

Instruction 6.01, Eleventh Circuit Special Instruction 10 and Federal Judicial Center Instruction 53.

6.03

Entrapment

(1) One of the questions in this case is whether the defendant was entrapped.

(2) Entrapment has two related elements. One is that the defendant was not already willing to commit the crime. The other is that the government, or someone acting for the government, induced or persuaded the defendant to commit it.

(3) If the defendant was not already willing to commit the crime, and the government persuaded him to commit it, that would be entrapment. But if the defendant was already willing to commit the crime, it would not be entrapment, even if the government provided him with a favorable opportunity to commit the crime, or made the crime easier, or participated in the crime in some way.

(4) It is sometimes necessary during an investigation for a government agent to pretend to be a criminal, and to offer to take part in a crime. This may be done directly, or the agent may have to work through an informer or a decoy. This is permissible, and without more

is not entrapment. The crucial question in entrapment cases is whether the government persuaded a defendant who was not already willing to commit a crime to go ahead and commit it.

(5) The government has the burden of proving beyond a reasonable doubt that the defendant was already willing to commit the crime. Let me suggest some things that you may consider in deciding whether the government has proved this:

(A) Ask yourself what the evidence shows about the defendant's character and reputation.

(B) Ask yourself if the idea for committing the crime originated with or came from the government.

(C) Ask yourself if the defendant took part in the crime for profit.

(D) Ask yourself if the defendant took part in any similar criminal activity with anyone else before or afterwards.

(E) Ask yourself if the defendant showed any reluctance to commit the crime and, if he did, whether he was overcome by government persuasion.

(F) And ask yourself what kind of persuasion and how much

persuasion the government used.

(6) Consider all the evidence, and decide if the government has proved that the defendant was already willing to commit the crime. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty.

COMMITTEE COMMENTARY 6.03

Before the Supreme Court's decision in Mathews v. United States, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988), it was well-established that a defendant must admit all of the elements of the offense before he would be entitled to an entrapment instruction. E.g., United States v. Prickett, 790 F.2d 35 (6th Cir. 1986); United States v. Whitley, 734 F.2d 1129 (6th Cir. 1984). In Mathews, the Supreme Court held that even if a defendant denies one or more elements of the crime for which he is charged, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find that the government entrapped him.

A valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. Mathews v. United States, supra, 485 U.S. at 62-63. Accord United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990). Although predisposition is the key element in an entrapment defense, Instruction 6.03 avoids the term because it could confuse the jury.

As long as the defendant shows a predisposition to commit an offense, governmental participation in the commission of an offense by itself cannot be the basis of an entrapment defense. United States v. Leja, 563 F.2d 244 (6th Cir. 1977), cert. denied, 434 U.S. 1074 (1978). See also Seventh Circuit Instruction 4.04 and Eighth Circuit Instruction 9.01 (No entrapment even if the government provided a favorable opportunity to commit the offense, made committing the offense easier, or even participated in acts essential to the offense).

Although there is some authority that police overinvolvement in

a crime may bar conviction on due process grounds, case law indicates that a successful defense on such grounds will be exceptionally rare. E.g., Hampton v. United States, 425 U.S. 484, 495 n. 7, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976); United States v. Leja, supra, 563 F.2d at 247 (Rubin, J. dissenting).

No instruction on entrapment need be given unless there is some evidence of both government inducement and lack of predisposition. United States v. Nelson, supra, 922 F.2d at 317. It is the duty of the trial judge to determine whether there is sufficient evidence of entrapment to allow the issue to go before the jury. If there is, then the burden shifts to the government to prove predisposition. United States v. Meyer, 803 F.2d 246, 249 (6th Cir. 1986), cert. denied, 480 U.S. 936. The government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. E.g., United States v. Jones, 575 F.2d 81, 83-84 (6th Cir. 1978).

In United States v. Nelson, supra, 922 F.2d at 317, the Sixth Circuit pointed out five factors identified by the Seventh Circuit as relevant in determining whether a defendat was predisposed. Those five factors are: (1) the character or reputation of the defendant; (2) whether the suggestion of the criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant evidenced reluctance to commit the offense but was overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government. Instruction 6.03 adds a sixth factor--whether the defendant engaged in similar criminal activity before or after the government's involvement.

See generally Fifth Circuit Instruction 1.28, Seventh Circuit Instruction 4.04, Eighth Circuit Instruction 9.01, Ninth Circuit

Instruction 6.02, Eleventh Circuit Special Instruction 9 and Federal Judicial Center Instruction 54.

6.04

Insanity

(1) One of the questions in this case is whether the defendant was legally insane when the crime was committed. Unlike the other things that I have talked to you about, the defendant has the burden of proving this defense.

(2) A mental disease or defect by itself is not a defense. For you to return a verdict of not guilty because of insanity, the defendant must prove both of the following things by clear and convincing evidence:

(A) First, that he had a severe mental disease or defect when he committed the crime.

(B) And second, that as a result of this mental disease or defect, he was not able to understand what he was doing, or that it was wrong.

(3) Insanity may be temporary or permanent. You may consider evidence of the defendant's mental condition before, during and after the crime in deciding whether he was legally insane when the crime was

committed.

(4) In making your decision, you are not bound by what any of the witnesses testified. You should consider all the evidence, not just the opinions of the experts.

(5) If you find the defendant not guilty because of insanity, then it will be my duty to send him to a suitable institution. He will only be released from custody if he proves by clear and convincing evidence that his release would not create a substantial risk that he might injure someone or seriously damage someone's property.

(6) So, you have three possible verdicts--guilty; not guilty; or not guilty because of insanity. Keep in mind that even though the defendant has raised this defense, the government still has the burden of proving all the elements of the crime charged beyond a reasonable doubt.

USE NOTE: If the defendant is charged with any crime other than one involving bodily injury, or serious damage to property, or a substantial risk of bodily injury or serious damage to property, the language in the second sentence of paragraph (5) regarding the defendant's burden of proof in release proceedings should be changed from "clear and convincing evidence" to "a preponderance of the evidence."

COMMITTEE COMMENTARY 6.04

Before passage of the Comprehensive Crime Control Act of 1984, the burden of going forward was initially on the defendant and then, after introduction of some evidence of insanity, it shifted back to the prosecution. Once the issue of insanity was raised, the burden was on the government to show sanity beyond a reasonable doubt, and the jury had to be so instructed.

The Comprehensive Crime Control Act of 1984 made the insanity defense an affirmative defense and imposed on the defendant the burden of proving the defense by "clear and convincing" evidence. 18 U.S.C. §17(b) (formerly 18 U.S.C. §20(b)). See United States v. Amos, 803 F.2d 419, 421 (8th Cir. 1986). The statute also makes it clear that the defendant's inability to appreciate the nature and quality or the wrongfulness of his acts must have been the result of a "severe" mental disease or defect. 18 U.S.C. §17(a) (formerly 18 U.S.C. §20(a)). This was intended to ensure that nonpsychotic behavior disorders such as "immature personality" or a pattern of "antisocial tendencies" cannot be used to raise the defense, and that the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, do not constitute insanity. See S.R. Rep. No. 225, 98th Cong., 1st Sess. reprinted in 1984 U.S. Code Cong. & Adm. News 3182, 3407-3412. The statute in its entirety states:

> "(a) Affirmative defense.--It is an affirm-ative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) Burden of proof.--The defendant has the

> burden of proving the defense of insanity by clear and convincing evidence."

Another section of the Act added Section 4242 to Title 18, providing for a jury verdict of "not guilty only by reason of insanity." Before passage of the 1984 Act, there was no procedure for commitment to mental institutions of persons who were acquitted solely by reason of insanity and who were dangerous. Section 4243 of the Act set out a procedure by which a person found not guilty only by reason of insanity may be committed by the court, and may be released only if he proves "that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another." If the person was found not guilty by reason of insanity of an offense involving bodily injury, or serious damage to property, or a substantial risk of bodily injury or serious damage to property, then he must prove this by clear and convincing evidence to obtain his release. If the person was found not guilty by reason of insanity of any other offense, then he must only prove this by a preponderance of the evidence.

The House Committee endorsed the procedure used in the District of Columbia where the jury was instructed as to the effect of a verdict of not guilty by reason of insanity. H.R. Rep. No. 1030, 98th Cong., 2d Sess, 1984 U.S. Code Cong. & Adm. News 3182, 3422.

The Ninth and Eleventh Circuits have held that a defendant is entitled to an instruction on the insanity defense only if sufficient evidence has been presented to permit a reasonable jury to find that insanity has been shown with "convincing clarity." United States v. Whitehead, 896 F.2d 432, 435 (9th Cir.), cert. denied, 111 S.Ct. 342, 112 L.Ed.2d 306 (1990); United States v. Owens, 854 F.2d 432, 435 (11th

Cir. 1988).

In United States v. Medved, 905 F.2d 935, 940-941 (6th Cir. 1990), petition for cert. filed, No. 90-6566 (Dec. 19, 1990), the Sixth Circuit upheld instructions telling the jury to consider all the evidence, not just the expert testimony, in determining if the defense had been established.

See generally Fifth Circuit Instruction 1.33, Eighth Circuit Instruction 9.03, Ninth Circuit Instruction 6.03, Eleventh Circuit Special Instruction 11 and Federal Judicial Center Instruction 55.

6.05

Coercion or Duress

(1) One of the questions in this case is whether the defendant was coerced, or forced, to commit the crime.

(2) Coercion can excuse a crime, but only if the defendant reasonably feared that he [or others] would immediately be killed or seriously hurt if he did not commit the crime, and there was no reasonable way for him [or the others] to escape.

(3) The government has the burden of proving that the defendant was not coerced. For you to find the defendant guilty, the government must prove that his fear was unreasonable. In other words, the government must prove that it was not reasonable for him to think that committing the crime was the only way to save himself [or the others] from death or serious bodily harm. Unless the government proves this beyond a reasonable doubt, you must find him not guilty.

USE NOTE: The bracketed language in paragraphs (2) and (3) should be included when there is evidence that the threats were directed at someone other than the defendant.

COMMITTEE COMMENTARY 6.05

A defense of duress or coercion requires an immediate threat of death or serious bodily harm which forces the defendant to commit the criminal act, and the situation must be one in which there was no opportunity to avoid the danger. United States v. Campbell, 675 F.2d 815, 820-21 (6th Cir.), cert. denied, 459 U.S. 850 (1982). The threat of death or serious bodily harm may be a threat against another. In United States v. Garner, 529 F.2d 962, 969-70 (6th Cir.), cert. denied, 429 U.S. 850 (1976), a coercion instruction was required when a defendant alleged that she committed the illegal acts because of anonymous threats against her daughter.

A preliminary burden is placed on the defendant to introduce facts sufficient to trigger consideration of the defense by way of an instruction. Even when the supporting evidence is weak or of doubtful credibility, its presence requires an instruction. United States v. Garner, supra, 529 F.2d at 970. Once the instruction is triggered, the burden is on the government to prove beyond a reasonable doubt the absence of coercion. United States v. Campbell, supra, 675 F.2d at 821.

In United States v. Martin, 740 F.2d 1352, 1361 (6th Cir. 1984), the Sixth Circuit approved the following coercion instruction:

> "Coercion or compulsion may provide a legal excuse for the crime charged in the indictment. To provide a legal excuse for any criminal conduct, however, the compulsion must be present and immediate and of such a nature to induce a well-founded fear of impending death or serious bodily injury. The alleged fact that a defendant is told he will suffer incarceration if he does not engage in criminal activity provides no legal excuse for committing a crime."

In cases involving any justification-type defense to a charge of

possession of a firearm by a felon, significant modifications must be made in this instruction. See United States v. Singleton, 902 F.2d 471, 472-473 (6th Cir.), cert. denied, 111 S.Ct. 196, 112 L.Ed.2d 158 (1990). See also United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (proffered defense of temporary innocent possession).

See generally Seventh Circuit Instruction 4.05, Eighth Circuit Instruction 9.02, Ninth Circuit Instruction 6.04, Eleventh Circuit Special Instruction 12 and Federal Judicial Center Instruction 56.

6.06

Self-Defense

(1) One of the questions in this case is whether the defendant acted in self-defense.

(2) A person is entitled to defend himself against the immediate use of unlawful force. But the right to use force in self-defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.

(3) The government has the burden of proving that the defendant did not act in self-defense. For you to find the defendant guilty, the government must prove that it was not reasonable for him to think that the force he used was necessary to defend himself against an immediate threat. Unless the government proves this beyond a reasonable doubt, you must find him not guilty.

COMMITTEE COMMENTARY 6.06

As with most affirmative defenses, once the defendant raises the defense the government must establish beyond a reasonable doubt that the defendant's action was not in self-defense. Including a specific statement of the burden of proof in a self-defense instruction is preferable to relying on a general burden of proof instruction. DeGroot v. United States, 78 F.2d 244 (9th Cir. 1935); United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977); United States v. Jackson, 569 F.2d 1003 (7th Cir.), cert. denied, 437 U.S. 907 (1978).

Sixth Circuit decisions indicate that a defendant is limited in using force in self-defense to those situations where there are reasonable grounds for believing that such force is necessary under the circumstances. See United States v. Guyon, 717 F.2d 1536, 1541 (6th Cir. 1983), cert. denied, 465 U.S. 1067 (1984).

See generally Seventh Circuit Instruction 4.01, Eighth Circuit Instruction 9.04 and Ninth Circuit Instruction 6.05.

Chapter 7.00

Special Evidentiary Matters

7.01

Introduction

(1) That concludes the part of my instructions explaining the elements of the crime [the defendant's position]. Next I will explain some rules that you must use in considering some of the testimony and evidence.

USE NOTE: The bracketed language in the first sentence of paragraph (1) should be used instead of the language referring to the elements of the crime when a defense has been explained or a defense theory instruction has been given.

COMMITTEE COMMENTARY 7.01

This instruction is a transitional one designed to be used as a lead-in to the instructions explaining the rules for evaluating certain evidence.

7.02A

Defendant's Failure to Testify

(1) A defendant has an absolute right not to testify [or present evidence]. The fact that he did not testify [or present any evidence] cannot be considered by you in any way. Do not even discuss it in your deliberations.

(2) Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

USE NOTE: The better practice is not to give this instruction unless the defendant requests it.

The bracketed language in paragraph (1) should be included when the defense has not presented any evidence.

If there is more than one non-testifying defendant, and some, but not all, the defendants request this instruction, it should be given in general terms without using the defendants' names.

COMMITTEE COMMENTARY 7.02A

This instruction is patterned after Federal Judicial Center Instruction 22.

The need for such an instruction in federal criminal cases was first noted in Bruno v. United States, 308 U.S. 287, 60 S. Ct. 198, 84 L. Ed. 257 (1939), in which a unanimous court held that 18 U.S.C. §3481 required such an instruction where the defendant requested it. In Carter v. Kentucky, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), the Court firmly based the right on the Fifth Amendment and extended the requirement to state criminal prosecutions.

In Lakeside v. Oregon, 435 U.S. 333, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978), the Supreme Court upheld the practice of a state trial judge giving such an instruction over the defendant's objection that the instruction would call attention to his failure to testify. The Lakeside Court reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant's failure to testify, and that "a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of this privilege not to testify is 'comment' of an entirely different order." Id. at 339. While it may be permissible to give this instruction over the defendant's objection, the better practice is not to give it unless it is requested by the defendant.

Apparently, there are no Sixth Circuit opinions where, in a case involving multiple defendants, one defendant requests such an instruction while another objects to it. However, following the reasoning in Carter and Lakeside, it is clear that any such instruction is not harmful to a co-defendant. See also United States v. Schroeder,

433 F.2d 846, 851 (8th Cir. 1970), cert. denied, 401 U.S. 943 (1971); Caton v. United States, 407 F.2d 367 (8th Cir.), cert. denied, 395 U.S. 984 (1969); United States v. Kelly, 349 F.2d 720, 768-69 (2nd Cir. 1965), cert. denied, 384 U.S. 947 (1966). The Commentary to Federal Judicial Center Instruction 22 recommends that if there is more than one non-testifying defendant and an instruction is requested by some but not all such defendants, it should be given in general terms without the use of the defendants' names.

7.02B

Defendant's Testimony

(1) You have heard the defendant testify. Earlier, I talked to you about the "credibility" or the "believability" of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony.

(2) You should consider those same things in evaluating the defendant's testimony.

USE NOTE: This instruction should be used when the defendant chooses to testify.

COMMITTEE COMMENTARY 7.02B

This instruction is patterned after language found in Devitt and Blackmar Instruction 17.12. See also Seventh Circuit Instruction 1.02 and Ninth Circuit Instruction 3.07.

7.03

Expert Testimony

(1) You have heard the testimony of _____, an expert witness. An expert witness has special knowledge or experience that allows the witness to give an opinion.

(2) You do not have to accept an expert's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

COMMITTEE COMMENTARY 7.03

Under the Federal Rules of Evidence, an expert may testify in order to assist the trier of fact to understand the evidence or determine a fact in issue. Such testimony may be in the form of an opinion. Fed. R. of Evid. 702. The basic approach to opinion testimony in the Federal Rules of Evidence is to allow it when it is helpful to the trier of fact. This includes opinions as to an ultimate issue to be decided by the trier of Fact. Fed. R. of Evid. 704. However, expert testimony as to ultimate issues with respect to a defendant's mental state or condition may not be introduced. Fed. R. of Evid. 704(b); United States v. Pickett, 604 F. Supp. 407 (S.D. Ohio 1985).

There is some question whether this instruction is necessary in light of the general instruction relating to the jury's role in determining the weight and credibility of witnesses. However, all circuits that have drafted pattern instructions and the Federal Judicial Center include a special instruction such as this one on expert testimony. See Fifth Circuit Instruction 1.18, Seventh Circuit Instruction 3.27, Eighth Circuit Instruction 4.10, Ninth Circuit Instruction 4.16, Eleventh Circuit Basic Instruction 7 and Federal Judicial Center Instruction 27.

There is no case authority supporting the instruction in the Sixth Circuit, but a similar instruction was upheld in United States v. Johnson, 575 F.2d 1347, 1361 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979).

7.04

Impeachment by Prior Inconsistent Statement Not Under Oath

(1) You have heard the testimony of_____. You have also heard that before this trial he made a statement that may be different from his testimony here in court.

(2) This earlier statement was brought to your attention only to help you decide how believable his testimony was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

USE NOTE: This instruction must be given when a prior inconsistent statement which does not fall within Fed. R. Evid. 801(d)(1)(A) has been admitted.

If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes.

COMMITTEE COMMENTARY 7.04

The traditional view had been that a prior statement of a witness is hearsay if offered to prove the happening of matters asserted therein. This did not preclude the use of the prior statement to impeach the witness if the statement was inconsistent with his testimony. Fed. R. Evid. 801(d)(1)(A) carved out an exception where the prior statement was under oath in a judicial hearing or in a deposition. Where a prior statement does not fall within Fed. R. Evid. 801(d)(1)(A), the jury must be instructed that the statement is offered solely to impeach the credibility of the witness. United States v. Harris, 523 F.2d 172, 175 (6th Cir. 1975); United States v. McDonald, 620 F.2d 559, 565 (5th Cir. 1980).

If during the course of the trial, several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, then this instruction should be given with the court identifying the impeaching statement or statements.

7.05A

Impeachment of Defendant by Prior Conviction

(1) You have heard that before this trial the defendant was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. You cannot use it for any other purpose. It is not evidence that he is guilty of the crime that he is on trial for now.

USE NOTE: This instruction should not be given if evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Fed. R. Evid. 404(b). Instead, the jury should be specifically instructed on the purpose for which the evidence was admitted. See Instruction 7.13.

COMMITTEE COMMENTARY 7.05A

Generally, evidence of a defendant's prior conviction is only admissible to attack his credibility as a witness. See Fed. R. Evid. 609; United States v. Sims, 588 F.2d 1145, 1149 (6th Cir. 1978). The defendant is entitled, upon request, to an instruction limiting the jury's consideration of the conviction to the purpose for which it was admitted.

The defendant's commission of other crimes may also be admissible to prove motive, opportunity, intent, and the like. See Fed. R. Evid. 404(b). In such cases, this instruction should not be given. Instead the jury should be specifically instructed on the purpose for which the evidence may be considered. See Instruction 7.13.

7.05B

Impeachment of a Witness Other Than

Defendant by Prior Conviction

(1) You have heard the testimony of _____. You have also heard that before this trial he was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. Do not use it for any other purpose. It is not evidence of anything else.

COMMITTEE COMMENTARY 7.05B

This instruction is designed for use when a witness other than the defendant is impeached by a prior conviction. The instruction is similar to Federal Judicial Center Instruction 30 and Ninth Circuit Instruction 4.08.

7.06A

Testimony of an Informer

(1) You have heard the testimony of _____. You have also heard that he received money [or _____] from the government in exchange for providing information.

(2) The use of paid informants is common and permissible. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

USE NOTE: The bracketed language in paragraph (1) should be used when some consideration other than money has been given.

This instruction may not be necessary if the informant's testimony has been materially corroborated, or if an accomplice cautionary instruction has been given.

COMMITTEE COMMENTARY 7.06A

In On Lee v. United States, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952), the Supreme Court said that to the extent an informant's testimony raises serious questions of credibility, the defendant is entitled to have the issue submitted to the jury "with careful instructions."

No cautionary instruction is required when there is no evidence that the witness was an informant. See United States v. Vinson, 606 F.2d 149, 154 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980). Less clear is whether an instruction is required if the witness's testimony has been materially corroborated. In United States v. Griffin, 382 F.2d 823, 827-828 (6th Cir. 1967), the Sixth Circuit indicated in dictum that even if corroborated, the better practice would be to give a cautionary instruction. But subsequently, in United States v. Vinson, supra, the Sixth Circuit rejected the argument that a cautionary instruction should have been given, in part on the ground that the witness's testimony had been materially corroborated. Vinson also indicated that no instruction was required because the district court had instructed the jury to treat the witness's testimony with care because of evidence that he was an accomplice, and that this "had the same cautionary effect" as if the court had given an informant instruction. Id.

Instruction 7.06A does not use the term "informer" in order to avoid pejorative labeling. See United States v. Turner, 490 F. Supp. 583 (E.D. Mich. 1979), aff'd, 633 F.2d 219 (6th Cir. 1980), cert denied, 450 U.S. 912 (1981). It is based on Fifth Circuit Instruction 1.15 and Federal Judicial Center Instruction 24.

7.06B

Testimony of an Addict-Informer Under Grant of Immunity or Reduced Criminal Liability

(1) You have heard the testimony of _____. You have also heard that he was using _____ during the time that he testified about, and that the government has promised him that he will not be prosecuted for _____ [or will _____] in exchange for his testimony against the defendant.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. An addict may have a constant need for drugs, and for money to buy drugs, and may also have a greater fear of imprisonment because his supply of drugs may be cut off. Think about these things and consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported

testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

USE NOTE: The bracketed language in paragraph (1) should be used when some consideration other than an agreement not to prosecute has been given by the government.

Whether this instruction must be given may depend on the particular circumstances of the case.

COMMITTEE COMMENTARY 7.06B

The proposed instruction is a plain English version of the instruction approved in United States v. Hessling, 845 F.2d 617 (6th Cir. 1988). Hessling approved the instruction but did not mandate its use.

In United States v. Dempewolf, 817 F.2d 1318, 1321 (8th Cir.), cert. denied, 484 U.S. 903 (1987), the Eighth Circuit noted four factors that may make an addict-informer instruction unnecessary: doubt as to whether the witness was an addict; cross-examination concerning the witness's addiction; corroboration of the testimony; and an instruction alerting the jury that an informer's testimony should be viewed with care. The Eighth Circuit said that there is no requirement that all four factors be present in order to eliminate the need for the instruction.

7.07

Testimony of a Witness Under Grant of Immunity or Reduced Criminal Liability

(1) You have heard the testimony of _____. You have also heard that the government has promised him that he will not be prosecuted for _____ [or, will _____] in exchange for his testimony against the defendant.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

USE NOTE: The bracketed language in paragraph (1) should be used when some consideration other than a promise not to prosecute

has been given by the government.

This instruction may not be necessary when the witness's testimony has been materially corroborated.

COMMITTEE COMMENTARY 7.07

This instruction is based on Fifth Circuit Instruction 1.15 and Federal Judicial Center Instruction 24. Its purpose is to alert the jury to potential credibility problems with witnesses who have entered into plea bargains in exchange for their testimony. Since the rationale for this instruction is similar to that for Instruction 7.06A on the testimony of an informer, the limitations from United States v. Vinson, 606 F.2d 149 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980), should apply. Where ample corroboration of the testimony exists, the instruction may not be necessary.

7.08

Testimony of an Accomplice

(1) You have heard the testimony of _____. You have also heard that he was involved in the same crime that the defendant is charged with committing. You should consider _____'s testimony with more caution than the testimony of other witnesses.

(2) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

[(3) The fact that _____ has pleaded guilty to a crime is not evidence that the defendant is guilty, and you cannot consider this against the defendant in any way.]

USE NOTE: This instruction is not necessary if the jury has been instructed to treat the witness's testimony with caution for other reasons.

Bracketed paragraph (3) should be included when the fact that an accomplice has pleaded guilty has been brought to the jury's attention.

COMMITTEE COMMENTARY 7.08

The Federal Judicial Center did not believe it necessary to have both an accomplice instruction and an immunity/plea bargain instruction, and thus only included the latter. The Seventh, Eighth and Ninth Circuits include both. See Seventh Circuit Instructions 3.19 and 3.22, Eighth Circuit Instructions 4.04 and 4.05 and Ninth Circuit Instructions 4.09 and 4.11.

In United States v. Ailstock, 546 F.2d 1285, 1288 (6th Cir. 1976), the Sixth Circuit held that an accomplice instruction alone adequately cautioned the jury about the weight to be given an accomplice's testimony, even though the accomplice had a plea bargain with the government and no plea bargain instruction had been given.

If the court thoroughly instructs the jury about evaluating the witness's credibility, and cautions the jury to use care in considering accomplice testimony, it is not an abuse of discretion to refuse any additional instruction on perjured testimony. United States v. Frost, 914 F.2d 756, 766 (6th Cir. 1990).

7.09

Character and Reputation of Defendant

(1) You have heard testimony about the defendant's good character. You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged.

COMMITTEE COMMENTARY 7.09

Some instruction on the defendant's good character is required if supported by the evidence. See Edgington v. United States, 164 U.S. 361, 365-367, 17 S. Ct. 72, 41 L. Ed. 467 (1896). Accord United States v. Huddleston, 811 F.2d 974, 977 (6th Cir. 1987). But there is disagreement about whether the instruction must say that good character evidence "standing alone" may create a reasonable doubt of guilt. See Spangler v. United States, 487 U.S. 1224, 108 S. Ct. 2884, 101 L. Ed. 2d 918 (1988) (White, J. dissenting to denial of certiorari) (noting disagreement).

Old Supreme Court cases provide some support for the position that "standing alone" language may be appropriate, at least in some circumstances. See Edgington, supra, 164 U.S. at 366 ("The circumstances may be such that . . . good character . . . would alone create a reasonable doubt."); Michelson v. United States, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948) ("[T]his Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed."). But recent decisions from other circuits have questioned whether these cases actually require that "standing alone" language be included.
E.g., United States v. Burke, 781 F.2d 1234, 1240-1241 (7th Cir. 1985).

Of all the officially sanctioned pattern federal instructions, only the Federal Judicial Center still explicitly includes "standing alone" language. See Federal Judicial Center Instruction 51. But in the accompanying commentary, the Judicial Center concedes that it is

"not clear that [such language] is legally required."

The Fifth and Eleventh Circuits include language that good character evidence may give rise to a reasonable doubt, without any explicit "standing alone" language, and state that such evidence should be considered "along with all the other evidence" in the case. See Fifth Circuit Instruction 1.10 and Eleventh Circuit Special Instruction 8.

The Seventh Circuit formerly included "standing alone" language in its pattern instruction, see Seventh Circuit Instruction 3.15, but Seventh Circuit decisions have since held that such language is misleading and not required. United States v. Burke, supra, 781 F.2d at 1238-1242.

The Eighth and Ninth Circuits recommend that no "standing alone" language be included, and that any instruction simply state that good character evidence should be considered along with all the other evidence in the case. See the Committee Comments to Eighth Circuit Instruction 4.03 and Ninth Circuit Instruction 4.05.

In Poliafico v. United States, 237 F.2d 97, 114 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957), the Sixth Circuit, without extensive analysis, rejected the argument that "standing alone" language should have been included in the district court's instructions. The Sixth Circuit characterized the instructions given, which told the jury to consider the good character evidence along with all the other evidence in the case, as "proper," citing Edginton in support.

In United States v. Huddleston, supra, 811 F.2d at 977, the Sixth Circuit, again without extensive analysis, held that the district court adequately met its responsibility to instruct on good character

evidence by instructing the jury to consider such evidence along with all the other evidence in determining whether the government had sustained its burden of proving guilt beyond a reasonable doubt.

Based on Poliafico and Huddleston, the Committee recommends that no "standing alone" language be included in the instruction. If such language is included, it should only be when special circumstances are present. See for example United States v. McMurray, 656 F.2d 540, 551 (10th Cir. 1980) (good character evidence was the only evidence offered by the defense). But see United States v. Burke, supra, 781 F.2d at 1242 (criticizing "standing alone" language even in such cases).

7.10

Age of Witness

(1) You have heard the testimony of _____, a young witness. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. With any witness, young or old, you should consider not only age, but also the witness's intelligence and experience, and whether the witness understands the duty to tell the truth and the difference between truth and falsehood.

COMMITTEE COMMENTARY 7.10

Under Fed. R. Evid. 601 there is no specific age requirement for the competency of witnesses. Generally, a child witness is considered competent if the judge finds that the child can understand the difference between truth and falsehood and is aware of his or her duty to tell the truth. Wheeler v. United States 159 U.S. 523, 16 S. Ct. 93, 40 L. Ed. 244 (1895).

7.11

Identification Testimony

(1) You have heard the testimony of _____, who has identified the defendant as the person who _____. You should carefully consider whether this identification was accurate and reliable.

(2) In deciding this, you should especially consider if the witness had a good opportunity to see the person at that time. For example, consider how long the witness had to see the person, and the visibility, and the distance, and whether the witness had known or seen the person before.

[(3) You should also consider the circumstances of the earlier identification that occurred outside of court. For example, consider how that earlier identification was conducted, and how much time passed after the alleged crime before the identification was made.]

(4) Consider all these things carefully in determining whether the identification was accurate and reliable.

(5) Remember that the government has the burden of proving beyond

a reasonable doubt that the defendant was the person who committed the crime charged.

USE NOTE: This instruction should be given when the identification has become an issue because of lack of corroboration, or limited opportunity for observation, or when the witness's memory has faded by the time of trial.

Bracketed paragraph (3) should be included when evidence of an out-of-court identification has been admitted.

COMMITTEE COMMENTARY 7.11

The testimony of a single eyewitness is sufficient to take a criminal case to the jury. However, courts have recognized that there is a serious possibility of mistake inherent in uncorroborated identification testimony. United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974). In cases where identification is a key issue, courts have required an instruction that emphasizes the need for finding that the circumstances of the identification are convincing beyond reasonable doubt.

The leading case is United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). Telfaire set out a model instruction in an appendix which emphasized: (1) the capacity and opportunity of the witness to observe reliably the offender; (2) the question whether the identification was the product of the witness's own recollection; (3) the inconsistent identification made by the same witness; and (4) the credibility of the witness. Id. at 558-59. The Telfaire type instruction has been adopted by the Sixth Circuit, United States v. Scott, 578 F.2d 1186, 1191 (6th Cir.), cert. denied, 439 U.S. 870 (1978), as well as the Eighth, Seventh, and Fourth Circuits, United States v. Roundtree, 527 F.2d 16, 19 (8th Cir. 1975), cert. denied, 424 U.S. 923 (1976); United States v. Hodges, 515 F.2d 650, 652-53 (7th Cir. 1973; United States v. Holley, 502 F.2d 273, 275 (4th Cir. 1974). A similar instruction was adopted by the Third Circuit before Telfaire. United States v. Barber, 442 F.2d 517, 528 (3rd Cir.), cert. denied, 404 U.S. 958 (1971). The Ninth Circuit recommends that no such instruction be given. See Committee Comment to Ninth Circuit Instruction 4.13.

The instruction should be given when the identification has become

an issue because of lack of corroboration or limited opportunity for observation, or where the witness's memory has faded by the time of trial. United States v. Scott, supra, 578 F.2d at 1191.

This instruction is a modification of the Telfaire instruction. It is similar to Seventh Circuit Instruction 3.06.

See also Fifth Circuit Instruction 1.29, Eighth Circuit Instruction 4.08 and Federal Judicial Center Instruction 35.

7.12

Summaries Not Admitted in Evidence

(1) You have seen some charts and summaries that may help explain the evidence. That is their only purpose, to help explain the evidence. They are not themselves evidence or proof of any facts.

COMMITTEE COMMENTARY 7.12

This instruction should be used when charts and summaries are not received into evidence, but are used for demonstrative purposes. To avoid the charts and summaries from taking on a life of their own as evidence, the court must examine them to determine that everything they contain is supported by the evidence, and the jury must be instructed that they are not evidence but only an aid in evaluating the evidence. United States v. Scales, 594 F.2d 558 (6th Cir.), cert. denied, 441 U.S. 946 (1979).

In United States v. Bartone, 400 F.2d 459 (6th Cir. 1968), cert. denied, 393 U.S. 1027 (1969), the Sixth Circuit indicated that the jury should also be cautioned that the summaries have no significance if the underlying evidence is not believed.

7.13

Other Acts of Defendant

(1) You have heard testimony that the defendant committed some acts other than the ones charged in the indictment.

(2) You cannot consider this testimony as evidence that the defendant committed the crime that he is on trial for now. Instead, you can only consider it in deciding whether _____. Do not consider it for any other purpose.

(3) Remember that the defendant is on trial here only for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged beyond a reasonable doubt.

USE NOTE: This instruction should be used when evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Fed. R. Evid. 404(b).

COMMITTEE COMMENTARY 7.13

Fed. R. Evid. 404(b) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The threshold inquiry the trial court must make before admitting evidence under Rule 404(b) is whether such evidence is "probative of a material issue other than character." Huddelston v. United States, 485 U.S. 681, 686, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988). In so doing, the court necessarily assesses whether the evidence is relevant and, if so, whether the probative value is substantially outweighed by its potential for unfair prejudice under Fed. R. Evid. 403.

Once the evidence of other crimes has been admitted under Rule 404(b), it becomes important for the court to caution the jury regarding the reasons for its admission. United States v. Sims, 430 F.2d 1089 (6th Cir. 1970). However, if no limiting instruction is requested by the defendant, the failure of the court to give an instruction will not necessarily result in reversible error. United States v. Yopp, 577 F.2d 362 (6th Cir. 1978) (but noting that it would have been better practice for the court to give the instruction sua sponte).

If an instruction is given, it is important that the court carefully inform the jury about the limited purpose for which the evidence is admitted. This should include an explanation of what evidence was admitted and for what limited purpose. In United States v. Aims Back, 588 F.2d 1283, 1287 (9th Cir. 1979), the Ninth Circuit reversed a conviction when a cautionary instruction had been given but

the trial court did not state the specific purpose for admitting the evidence. An improper limiting instruction may have the effect of enhancing the prejudicial effect of the testimony. Id.

7.14

Flight, Concealment of Evidence, False Exculpatory Statements

(1) You have heard testimony that after the crime was supposed to have been committed, the defendant _____ _____.

(2) If you believe that the defendant _____ _____, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may _____ _____to avoid being arrested, or for some other innocent reason.

USE NOTE: The language in paragraphs (1) and (2) should be tailored to the specific kinds of evidence in the particular case.

COMMITTEE COMMENTARY 7.14

Certain actions of a defendant after the commission of the charged crime are deemed relevant to show guilt through consciousness of guilt. This includes evidence of flight, United States v. Touchstone, 726 F.2d 1116, 1119 (6th Cir. 1984); United States v. Rowan, 518 F.2d 685, 691 (6th Cir.), cert. denied, 423 U.S. 949 (1975), false exculpatory statements, Stanley v. United States, 245 F.2d 427 (6th Cir. 1957), and concealment or fabrication of evidence, United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986), cert. denied, 480 U.S. 922 (1987); United States v. Franks, 511 F.2d 25, 36 (6th Cir. 1975). The relevance of such evidence depends on a series of inferences. For example, the relevancy of evidence of flight depends on being able to draw three inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; and (3) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Some courts have questioned the reliability of this chain of inferences, focusing on the ambiguity of the behavior. Miller v. United States, 320 F.2d 767, 771 (D.C. Cir. 1963). The Supreme Court has expressed its lack of confidence in the probative value of flight evidence. In Wong Sun v. United States, 371 U.S. 471, 483 n. 10, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), the Court noted that

> "we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In Alberty v. United States, 162 U.S. 499, 16 S. Ct. 864, 40 L. Ed. 1051 (1895), this court said: '... it is not universally true that a man, who is conscious that he has done a wrong, will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper, since

> it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that the wicked flee when no man pursueth, but the righteous are as bold as a lion'."

The admission of the evidence is particularly troublesome when the weak probative value is balanced against its potential prejudice. One commentator has noted that "one is forced to wonder whether the evidence is not directed to punishing the 'wicked' generally rather than resolving the issue of guilt of the offense charged." McCormick, Evidence, §271, at 803 (1984).

Despite these reservations, the Sixth Circuit has held that evidence of flight is admissible even though the flight was not immediately after the commission of the crime or after the defendant is accused of the crime. Touchstone, supra, 726 F.2d at 1119-1120. In that case the court explicitly approved the following instruction:

> "The intentional flight or concealment of a defendant is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence." Id.at n. 6.

Spoliation of evidence is admissible to show consciousness of guilt. The fact that a defendant attempts to fabricate or conceal evidence indicates a consciousness that his case is weak and from that the defendant's guilt may be inferred. United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986), cert. denied, 480 U.S. 922 (1987); United States v. Franks, 511 F.2d 25, 36 (6th Cir.), cert. denied, 422 U.S. 1042 (1975). It has been held to be reversible error for the court to instruct that such evidence might be considered evidence of guilt rather than evidence of "consciousness of guilt." As with all

consciousness of guilt evidence, there is some dispute as to its admissability. See Weinstein's Evidence, Section 401[10].

The Fifth, Seventh, Ninth and Eleventh Circuits either do not include any consciousness of guilt instructions, or specifically recommend that these matters be left to argument and that no such instructions be given. See the Committee Comments to Seventh Circuit Instruction 3.05 and Ninth Circuit Instruction 4.03. The Eighth Circuit includes instructions on concealment, destruction or fabrication of evidence, influencing a witness's testimony and false exculpatory statements. See Eighth Circuit Instructions 4.09 and 4.15. The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions After the Crime." See Federal Judicial Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

Based on Sixth Circuit authority, the Committee recommends one generic instruction for all consciousness of guilt situations which can be modified as circumstances dictate.

7.15

Silence in the Face of Accusation

(1) You have heard testimony that the defendant was accused of the crime and that he said nothing in response.

(2) If you believe that the defendant heard this accusation and understood it, then you may consider his silence, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. His silence may be significant. On the other hand, sometimes an innocent person may not respond to such an accusation for some innocent reason.

USE NOTE: This instruction should not be given if the defendant remained silent following Miranda warnings.

COMMITTEE COMMENTARY 7.15

The prosecution is generally permitted to prove that a defendant has adopted the statement of another. This adoption may be manifested by silence when an accusatory statement is made in the defendant's presence and hearing, and he understands and has an opportunity to deny it. McCormick, Evidence, §270, at 800-80l. See also Heller, Admissions by Acquiescence, 15 U. Miami L. Rev. 161 (1960).

Before admitting the admission by silence, the trial judge must determine whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond. The jury then decides, with proper instructions from the court, whether in the context of the surrounding facts, the defendant actually heard, understood, and acquiesced in the statement. United States v. Moore, 522 F.2d 1068, 1075-76 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976).

Various considerations raise doubts about the propriety of permitting the introduction of statements adopted by silence by the defendant when an accusation is made by the police. In addition to the inherently ambiguous nature of the inference itself, silence by the defendant may be motivated by various other factors including his privilege against self-incrimination. In Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Supreme Court held that it violates due process to use a defendant's silence after he has received Miranda warnings to impeach an exculpatory story given for the first time at trial. Obviously, once the Miranda warnings have been given advising the defendant of his right to remain silent, the defendant's failure to speak may not be considered an admission. United States v.

McKinney, 379 F.2d 259 (6th Cir. 1967); McCarthy v. United States, 25 F.2d 298 (6th Cir. 1928). However, testimony by a government witness that a defendant had been advised of his Miranda rights, with no subsequent testimony concerning the defendant's failure to make statements, does not constitute improper comment on the right to remain silent. United States v. Whitley, 734 F.2d 1129 (6th Cir. 1984).

7.16

Possession of Recently Stolen Property

(1) You have heard testimony that the defendant had possession of some property that was recently stolen.

(2) If you believe that the defendant had possession of this property, you may consider this, along with all the other evidence, in deciding whether the defendant knew that the property was stolen [or stole the property]. But the longer the period of time between the theft and his possession, the less weight you should give this evidence.

(3) You do not have to draw any conclusion from the defendant's possession of the property. You may still have a reasonable doubt based on all the other evidence. Remember that the burden is always on the government to prove beyond a reasonable doubt that the defendant committed the crime charged.

USE NOTE: The bracketed language in paragraph (2) should be used when the government is attempting to prove in the alternative that the defendant either possesed the property knowing that it was stolen, or stole the property.

COMMITTEE COMMENTARY 7.16

In Barnes v. United States, 412 U. S. 837, 843, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973), the Supreme Court noted that "[f]or centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods." The inference is only possible where the accused is found in exclusive possession of property recently stolen and the possession is not otherwise explained. Pendergrast v. United States, 416 F.2d 776, cert. denied, 395 U.S. 926 (1969).

How far the inference may be taken is somewhat in question. In Barnes, the prosecution was for the possession of checks, and the inference only extended to the knowledge of the defendant that they were stolen. However, some courts have extended the inference, when combined with the other evidence in the case, from possession of stolen goods to the theft itself. United States v. Carter, 522 F.2d 666, 679 (D.C. Cir. 1975); United States v. Johnson, 433 F.2d 1160 (D.C. Cir. 1970).

In United States v. Jennewein, 580 F.2d 915 (6th Cir. 1978), the Sixth Circuit initially reversed an interstate theft conviction because the district court had given an instruction that authorized the jury to infer that the defendant had participated in the theft based on his possession of recently stolen property. The panel said that "[n]either Barnes nor any other authority cited or discovered justifies the additional inference that would permit the finder of fact to conclude that the possessor of stolen property by virtue of such possession may be deemed to have participated in its theft." But on rehearing, the Sixth Circuit vacated its initial decision and upheld the district

court's instruction, stating that the instruction "did not misstate the law." United States v. Jennewein, 590 F.2d 191, 192 (6th Cir. 1978).

The instruction approved and reprinted by the D.C. Circuit in Pendergrast v. United States, supra, 416 F.2d at 790, clearly extends the inference to the theft or robbery itself:

> "In weighing the evidence adduced at this trial, you may consider the circumstance, if you find that it is established beyond a reasonable doubt, that the defendant had the exclusive possession of property specified in the [_____ count of the] indictment, recently after that property was stolen in the robbery alleged therein. You are not required to draw any conclusion from that circumstance, but you are permitted to infer, from the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property, that the defendant is guilty of the offense, if in your judgment such an inference is warranted by the evidence as a whole.
>
> The defendant's possession of the recently stolen property does not shift the burden of proof. The burden is always upon the Government to prove beyond a reasonable doubt every essential element of an offense before the defendant may be found guilty of that offense. Before you may draw any inference from the defendant's unexplained or unsatisfactorily explained possession of property stolen in the robbery charged in the [_____ count of the] indictment, you must first find that the Government has proved beyond a reasonable doubt every essential element of that offense, and as to those elements I have already instructed you. If you should find that the Government has proved beyond a reasonable doubt every essential element of that offense, the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property is a circumstance from which you may find, by the process of inference, that the defendant was the person [one of the persons] who stole it. In short, if the Government has proved beyond a reasonable doubt every essential element of the offense of robbery charged in this case, then, but only then, the defendant's unexplained or unsatisfactorily explained possession of property stolen in that robbery permits you to infer that the defendant was the robber [one of the robbers].

The word 'recently,' as used in these instructions, is a relative term, and it has no fixed meaning. Whether property may be considered as recently stolen depends upon all the facts and circumstances shown by the evidence. The longer the period of time since the theft of the property, the more doubtful becomes the inference which may reasonably be drawn from its unexplained or unsatisfactorily explained possession.

In considering whether the defendant's possession of the recently stolen property has been satisfactorily explained, you must bear in mind that the defendant is not required to [take the witness stand or] furnish an explanation. His possession may be satisfactorily explained by other circumstances shown by the evidence independently of any testimony by the defendant himself. And even though the defendant's possession of the recently stolen property is unexplained or is not satisfactorily explained, you cannot draw the inference under consideration if on the evidence as a whole you have a reasonable doubt as to his guilt.

It is exclusively within your province to determine (a) whether property specified in the [_____ count of the] indictment was stolen in the robbery alleged and, if so, (b) whether while recently stolen it was in the exclusive possession of the defendant and, if so, (c) whether the possession of the property has been satisfactorily explained, and (d) whether the evidence as a whole warrants any such inference.

If you should find that the Government has proved beyond a reasonable doubt every essential element of the offense of robbery charged in the [____ count of the] indictment, and that property specified in the [_____ count of the] indictment was stolen as alleged, and that, while recently stolen, it was in the exclusive possession of the defendant, you may draw, but you are not required to draw, from these circumstances the inference that the defendant is guilty of the offense of robbery charged in the [____ count of the] indictment, unless his possession of the property is satisfactorily explained by other circumstances shown by the evidence, or unless on the evidence as a whole you have a reasonable doubt as to his guilt.

If you should find that the Government has failed to prove beyond a reasonable doubt every

essential element of the offense of robbery charged in the [_____ count of the] indictment; or if you should find that the Government has failed to prove beyond a reasonable doubt that property specified in the [_____ count of the] indictment was in the exclusive possession of the defendant while recently stolen; or if the defendant's possession of the stolen property is satisfactorily explained by other circumstances shown by the evidence; or if, on the evidence as a whole, you have a reasonable doubt as to the defendant's guilt; then, in any one or more of these events, you must find the defendant not guilty of the offense of robbery charged in the [_____ count of the] indictment."

7.17

Transcriptions of Tape Recordings

(1) You have heard some tape recordings that were received in evidence, and you were given some written transcripts of the tapes.

(2) Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The tapes themselves are the evidence. If you noticed any differences between what you heard on the tapes and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the tapes, you must ignore the transcripts as far as those parts are concerned.

COMMITTEE COMMENTARY 7.17

Tape recordings are generally admissible unless the incomprehensible portions of the tapes are so substantial as to render the recordings as a whole untrustworthy. United States v. Terry, 729 F.2d 1063, 1068 (6th Cir. 1984). The decision to admit tape recordings into evidence rests with the trial court. United States v. Vinson, 606 F.2d 149 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980). Such tapes must be authentic, accurate, trustworthy and sufficiently audible and comprehensible for the jury to consider the contents. See United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983).

When a recording is admissible, an accurate transcript of the recording may be provided, in the trial court's discretion, for the jury to use while the recording is played, so that the jury may follow the recording more easily. See United States v. Robinson, supra, 707 F.2d at 876. But the Sixth Circuit has expressed a clear preference that a transcript not be submitted to the jury unless the parties stipulate to its accuracy. Id. See also United States v. Vinson, supra, 606 F.2d at 155.

In the absence of a stipulation, the transcriber should verify that he or she has listened to the tape and accurately transcribed its content, and the court should make an independent determination of accuracy by comparing the transcript against the tape and directing the deletion of the unreliable portion of the transcript. United States v. Robinson, supra, 707 F.2d at 879.

Another option, but the least preferred, is to submit two transcripts to the jury, one from the government and one from the defense. See United States v. Martin, 920 F.2d 393, 396 (6th Cir.

1990). But this has been held to be prejudicial error requiring reversal if the tape is significantly inaudible, even if a cautionary instruction is given. United States v. Robinson, supra, 707 F.2d at 879.

7.18

Separate Consideration--Evidence

Admitted Against Certain Defendants Only

(1) You have heard testimony from _____.

that _____.

(2) You can only consider this testimony against _____ in deciding whether the government has proved him guilty. You cannot consider it in any way against any of the other defendants.

COMMITTEE COMMENTARY 7.18

This instruction is modeled after Federal Judicial Center Instruction 19. It is designed to supplement any mid-trial instructions given when evidence admissible against only one defendant is introduced.

7.19

Judicial Notice

(1) I have decided to accept as proved the fact that _____, even though no evidence was presented on this point. You may accept this fact as true, but you are not required to do so.

COMMITTEE COMMENTARY 7.19

This instruction is based on Ninth Circuit Instruction 2.05, and on Fed. R. Evid. 201(g). It should be given whenever the court has taken judicial notice of a fact.

Chapter 8.00

Deliberations And Verdict

8.01

Introduction

(1) That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

(2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

(3) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

[(4) If you want to see any of the exhibits that were admitted in evidence, you may send me a message, and those exhibits will be provided to you.]

(5) One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

USE NOTE: Bracketed paragraph (4) should be included if the exhibits are not being submitted to the jury except upon request.

COMMITTEE COMMENTARY 8.01

This proposed instruction covers some miscellaneous concepts such as selection of a foreperson, communications with the court and not disclosing numerical divisions that are commonly included in instructions on the jury's deliberations. See for example Fifth Circuit Instruction 12A.

In some districts all exhibits are routinely submitted to the jury when deliberations begin. In other districts exhibits are not provided unless the jury asks for them. Bracketed paragraph (4) should be used when the exhibits are not provided unless the jury makes a request.

8.02

Experiments, Research and Investigation

(1) Remember that you must make your decision based only on the evidence that you saw and heard here in court. Do not try to gather any information about the case on your own while you are deliberating.

(2) For example, do not conduct any experiments inside or outside the jury room; do not bring any books, like a dictionary, or anything else with you to help you with your deliberations; do not conduct any independent research, reading or investigation about the case; and do not visit any of the places that were mentioned during the trial.

(3) Make your decision based only on the evidence that you saw and heard here in court.

COMMITTEE COMMENTARY 8.02

The purpose of this instruction is to caution the jurors that they must not attempt to gather any information about the case on their own during their deliberations. It is based on language commonly included in the court's preliminary instructions to the jury. See for example Ninth Circuit Instruction 1.08, Federal Judicial Center Instruction 1 and Saltzberg and Perlman Instruction 1.19.

8.03

Unanimous Verdict

(1) Your verdict, whether it is guilty or not guilty, must be unanimous.

(2) To find the defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.

(3) To find him not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

(4) Either way, guilty or not guilty, your verdict must be unanimous.

COMMITTEE COMMENTARY 8.03

Fed. R. Crim. P. 31(a) mandates that jury verdicts in federal criminal trials "shall be unanimous." This also appears to be constitutionally required. See Johnson v. Louisiana, 406 U.S. 356, 366-403, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (five justices indicate in dicta that the Sixth Amendment requires unanimous verdicts in federal criminal trials).

None of the circuits that have drafted pattern instructions treat the unanimity requirement as a distinct concept in a separate instruction. Given the importance of this concept, the Committee believes that a separate instruction is appropriate.

Most instructions make no attempt to specifically relate the unanimity requirement to the requirement of proof beyond a reasonable doubt. Given the importance of the reasonable doubt requirement, the Committee believes that the jurors should be specifically instructed on this point. As characterized by the Supreme Court in In re Winship, 397 U.S. 358, 363-364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (l970), the reasonable doubt standard plays a "vital" role in our criminal justice system. It is a "prime instrument" for reducing the risk of an erroneous conviction. And it performs the "indispensable" function of "impress[ing] . . . the trier of fact [with] the necessity of reaching a subjective state of certitude [on] the facts in issue."

Four of the five circuits that have drafted pattern instructions, and the Federal Judicial Center, briefly mention that a not guilty verdict must also be unanimous. See Seventh Circuit Instruction 7.06, Eighth Circuit Instruction 3.12, Ninth Circuit Instruction 7.01, Eleventh Circuit Basic Instruction 11 and Federal Judicial Center

Instruction 9. Typical is Ninth Circuit Instruction 7.01 which states, "Your verdict, whether guilty or not guilty, must be unanimous." This instruction attempts to make this point clearer, to avoid any possible confusion.

8.03A

Unanimity of Theory

(1) One more point about the requirement that your verdict must be unanimous. Count _____ of the indictment accuses the defendant of committing the crime of _____ in either one of two different ways. The first is that he _____. The second is that he _____.

(2) The government does not have to prove both of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of one or the other is enough. But in order to return a guilty verdict, all twelve of you must agree that the same one has been proved. All of you must agree that the defendant _____. Or all of you must agree that he _____.

USE NOTE: This instruction should be used when the alternative means specified in the indictment are conceptually separate and distinct, and there are special circumstances creating a genuine risk that a conviction may occur as a result of

different jurors concluding that the defendant committed different acts.

COMMITTEE COMMENTARY 8.03A

Fed. R. Crim. P. 7(c) permits the government to allege in one count of an indictment that "the defendant committed [the offense] by one or more specified means." In United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988), the Sixth Circuit followed the lead of the Fifth Circuit's decision in United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), and held that when the alternative means specified in a single count are conceptually separate and distinct, and special circumstances create a genuine risk that a conviction may occur as a result of different jurors concluding that the defendant committed different acts, the district court must give an augmented unanimity instruction specifically telling the jurors that they must unanimously agree on at least one of the alternative means in order to convict. Accord United States v. Beros, 833 F.2d 455 (3rd Cir. 1987).

In Duncan, a taxpayer and his tax preparer were indicted for violating 26 U.S.C. §§ 7206(1) and 7206(2), which prohibit the making and the preparation of a tax return containing a false statement as to a material matter. The indictment charged that the taxpayer's 1982 return contained two separate and distinct false statements--one relating to a $115,000 capital gain, and another relating to an $8,800 interest deduction. Evidence was presented supporting both false statements, and the jury returned a general verdict finding the taxpayer and his tax preparer guilty as charged.

The Sixth Circuit reversed, concluding that the two false statements were conceptually separate and distinct, and that there were sufficient "special circumstances" requiring that an augmented unanimity instruction be given. The special circumstances cited by the

Sixth Circuit were a pretrial defense motion that had specifically identified the potential for a "patchwork" verdict, and a mid-deliberation question from the jury that raised a genuine possibility that different jurors relied on a different false statement as the underlying factual predicate for guilt.

Other than in Duncan, the Sixth Circuit has consistently held that an augmented unanimity instruction is not required. See United States v. Zalman, 870 F.2d 1047, 1056 n.10 (6th Cir.), cert. denied, 109 S.Ct. 3248, 106 L.Ed.2d 594 (1989); United States v. Busacca, 863 F.2d 433, 437-438 (6th Cir. 1988), cert. denied, 490 U.S. 1005 (1989); United States v. Bouquett, 820 F.2d 165, 168-169 (6th Cir. 1987); United States v. McPherson, 782 F.2d 66, 67-68 (6th Cir. 1986); and United States v. McGuire, 744 F.2d 1197, 1202-1203 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). See also United States v. English, 925 F.2d 154, 158-159 (6th Cir. 1991).

In McKoy v. North Carolina, 494 U.S. ____, 110 S.Ct. 1227, 1236-1237, 108 L. Ed. 2d 369, 385 (1990), Justice Blackmun, concurring, stated that there is no general requirement that the jury reach unanimous agreement on the preliminary factual issues that underlie the verdict. But he added that one significant exception is in federal criminal prosecutions, where a unanimous verdict is required. He said that there is general consensus among the federal circuits that there must be substantial agreement as to the principal factual elements underlying a specified offense, citing Duncan among other cases.

In Schad v. Arizona, 788 P.2d 1182 (Ariz. 1989), cert. granted, ____ U.S. ____, 111 S. Ct. 243, 112 L. Ed. 2d 202 (1990) (No. 90-5551), the Supreme Court granted certiorari to consider whether an augmented unanimity instruction is constitutionally required in a first degree

murder case based on alternate theories of premeditated and felony-murder.

See generally Annotation, Requirement of Jury Unanimity as to Mode of Committing Crime Under Statute Setting Forth the Various Modes by Which Offense May Be Committed, 75 A.L.R. 4th 91 (1990).

8.04

Duty to Deliberate

(1) Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

(2) But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

(3) No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

(4) Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

USE NOTE: This instruction is designed for use before deliberations begin as part of the court's final instructions to the jury.

COMMITTEE COMMENTARY 8.04

This instruction is designed for use before deliberations begin as part of the court's final instructions to the jury. Its content is heavily dependent on cases dealing with post-deliberation Allen charges. In United States v. Sawyers, 902 F.2d 1217, 1220-1221 (6th Cir. 1990), petition for cert. filed, (Aug. 10, 1990) (No. 90-5426), the Sixth Circuit said that an Allen charge "probably would have its least coercive effect if given along with the rest of the instructions before the jury ever start[s] deliberating."

In Allen v. United States, 164 U.S. 492, 501-502, 17 S. Ct. 154, 41 L. Ed. 528 (1896), the district court gave some lengthy supplemental instructions which, as paraphrased by the Supreme Court in its opinion, included the following concepts:

l) that in a large proportion of cases absolute certainty could not be expected;

2) that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other;

3) that it was their duty to decide the case if they could conscientiously do so;

4) that they should listen, with a disposition to be convinced, to each other's arguments;

5) that, if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one given that it had made no impression upon the minds of so many equally honest and intelligent persons; and

6) that if, on the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

The Supreme Court analyzed these supplemental instructions as follows:

> "While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions."

The Supreme Court noted in its opinion that these instructions were "taken literally" from instructions approved by the Massachusetts Supreme Court in Commonwealth v. Tuey, 62 Mass. (8 Cush.) l, 2-3 (1851). The Tuey instructions included the following additional concepts, not noted by the Supreme Court in its Allen opinion:

> 7) that in order to make a decision more practicable, the law imposes the burden of proof on one party or the other;
>
> 8) that in a criminal case the burden of proof is on the government to prove every element of the charge beyond a reasonable doubt; and
>
> 9) that if the jurors are left in doubt as to any element, then the defendant is entitled to the benefit of that doubt and must be acquitted.

The records in the Allen case indicate that the actual instruction given by the district court only included a shortened version of these additional concepts. In the course of giving the supplemental instructions, the district court in Allen included the following from Tuey:

> "In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the government."

See Records and Briefs, United States Supreme Court, Vol. 829, October Term 1896, Allen v. United States, Docket No. 371, Transcript of Record pp 137-138. Except for one First Circuit decision, see Pugliano v. United States, 348 F.2d 902, 903-904 (1st Cir.), cert. denied, 382 U.S. 939 (1965), no other cases appear to have noticed or discussed this omission from the Supreme Court's opinion in Allen.

Despite substantial judicial and scholarly criticism of Allen in the years since it was decided, see generally American Bar Association Standards for Criminal Justice, Trial by Jury Standard 15-4.4 and Commentary, the Supreme Court recently reaffirmed Allen's constitutional validity in Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d. 568 (1988). Referring to the Allen Court's analysis quoted above, the Court said that "[t]he continuing validity of this Court's observations in Allen are beyond dispute." Lowenfield, supra at 237.

Sixth Circuit decisions have repeatedly emphasized that the instructions approved by the Supreme Court in Allen "approach 'the ultimate permissible limits' for a verdict urging instruction." E.g., United States v. Harris, 391 F.2d 348, 354 (6th Cir.), cert. denied, 393 U.S. 874 (1968), quoting Green v. United States, 309 F.2d 852, 855 (5th Cir. 1962). "Our . . . circuit has determined that the wording approved at the turn of the century represents, at best, 'the limits beyond which a trial court should not venture in urging a jury to reach a verdict'." United States v. Scott, 547 F.2d 334, 337 (6th Cir. 1977), quoting Harris, supra at 354. "Any variation upon the precise

language approved in Allen imperils the validity of the trial." Scott, supra at 337. Accord Williams v. Parke, 741 F.2d 847, 850 (6th Cir. 1984), cert. denied, 470 U.S. 1029 (1985); United States v. Giacalone, 588 F.2d 1158, 1166 (6th Cir. 1978), cert. denied, 441 U.S. 944 (1979); United States v. LaRiche, 549 F.2d 1088, 1092 (6th Cir.), cert. denied, 430 U.S. 987 (1977).

Among the more important variations that the Sixth Circuit has criticized or disapproved are the following: 1) statements regarding the expense and burden of conducting a trial, United States v. Harris, supra, 391 F.2d at 354 ("questionable extension"); 2) statements that the case must be decided at some time by some jury, id. at 355 ("coercive. . . [and] misleading"); 3) omitting statements reminding jurors that they should not surrender an honest belief about the outcome of the case simply because other jurors disagree, United States v. Scott, supra, 547 F.2d at 337 ("one of the most important parts of the Allen charge"); and 4) statements that juror intransigence would delay the trial of other cases and add to the court's backlog, Scott, supra at 337 ("impermissibly coercive").

These and other Sixth Circuit cases provide further guidance regarding the appropriate content of an Allen charge. In United States v. Barnhill, 305 F.2d 164, 165 (6th Cir.), cert. denied, 371 U.S. 865 (1962), the district court's supplemental instructions stressed the importance of reaching a verdict, and the duty of each individual juror to listen to the views expressed by the other jurors and to give those views due weight and consideration in attempting to arrive at a verdict. These statements were balanced with a reminder that each juror had the right to his own beliefs, and that if it developed that they could not agree, a mistrial would be declared and the case would

be submitted to another jury. The Sixth Circuit affirmed, stating that these instructions "complied with the standards approved . . . in Allen."

In United States v. Markey, 693 F.2d 594, 597 (6th Cir. 1982), the district court concluded its instructions to the jury with the comment that the courthouse would be available the next morning, which was Christmas Eve day, if the jury was not able to reach a consensus that afternoon. The Sixth Circuit affirmed, stating that this comment "was not 'likely to give the jury the impression that it was more important to be quick than to be thoughtful'."

In United States v. Harris, supra, 391 F.2d at 355, the Sixth Circuit explained as follows why instructions indicating that the case must be decided at some time by some jury were coercive and misleading:

> "The constitutional safeguards of trial by jury (Article III, Section 2, Clause 3, and the Sixth Amendment) have always been held to confer upon every citizen the right . . . to remain free from the stigma and penalties of a criminal conviction until he has been found guilty by a unanimous verdict of a jury of twelve of his peers. The possibility of disagreement by the jury and the lack of a unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution. For the judge to tell a jury that a case must be decided is therefore not only coercive in nature but is misleading in fact. It precludes the right of a defendant to rely on the possibility of disagreement by the jury."

The Sixth Circuit then noted that in Thaggard v. United States, 354 F.2d 735, 739 (5th Cir. 1965), cert. denied, 383 U.S. 958 (1966), the Fifth Circuit had said that:

> "[An] Allen charge should be approved only so long as it 'avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial'."

Harris and subsequent Sixth Circuit cases have said that there is a clear distinction between language stating that the case "must be decided at some time," which is improper, and language stating that the case "must be disposed of at some time," which is not. Harris, supra at 356. "The latter phrase merely restates the obvious proposition that all cases must come to an end at some point, whether by verdict or otherwise." United States v. LaRiche, supra, 549 F.2d at 1092.

In Williams v. Parke, supra, 741 F.2d at 850-852, the Sixth Circuit upheld the defendant's state court conviction against constitutional attack. In rejecting the argument that the state trial court's supplemental instructions violated due process, the Sixth Circuit emphasized that the instructions had not included the much criticized language from Allen singling out minority jurors. Id. at 850. See also Lowenfield v. Phelps, supra, 484 U.S. at 237-238 (noting same omission in the course of affirming a state court conviction). The Sixth Circuit also emphasized that the trial court's instructions implicitly advised the jurors of their "right to continue disagreeing" by alluding to the possibility that a new jury might be necessary, and by telling them that they should return to court if they could not agree. Williams, supra at 850. See also Hyde v. United States, 225 U.S. 347, 383, 32 S. Ct. 793, 56 L. Ed. 1114 (1912) (district court's instruction that it was not the court's intention to unduly prolong the deliberations, and that if the jurors could not conscientiously agree, they would be discharged, eliminated potential coercive effect of other instructions).

In United States v. LaRiche, supra, 549 F.2d at 1092-1093, the Sixth Circuit rejected the defendant's argument that the district court's Allen charge constituted plain error because it did not remind

the jurors of the government's burden of proof. But in doing so the Sixth Circuit did say that "it may be desirable for a judge to restate the beyond a reasonable doubt standard in an Allen charge." Id. at 1093. See also United States v. Lewis, 651 F.2d 1163, 1165 (6th Cir. 1981) (given the weakness of the evidence against the defendant, and the jury's difficulty in weighing the evidence, it was improper not to reinstruct on the government's burden of proving guilt beyond a reasonable doubt).

In United States v. Giacalone, supra, 588 F.2d at 1166-1167, the Sixth Circuit noted that in Kawakita v. United States, 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952), the Supreme Court implicitly approved an Allen charge which later became the basis for Devitt and Blackmar Instruction 18.14. That instruction, which is intended for use as a supplemental instruction when the jurors fail to agree, states:

> "The Court wishes to suggest a few thoughts which you may desire to consider in your deliberations, along with the evidence in the case, and all the instructions previously given.
>
> This is an important case. The trial has been expensive in time, and effort, and money, to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of some time. There appears no reason to believe that another trial would not be costly to both sides. Nor does there appear any reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you. Any future jury must be selected in the same manner and from the same source as you have been chosen. So, there appears no reason to believe that the case would ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

Of course these things suggest themselves, upon brief reflection, to all of us who have sat through this trial. The only reason they are mentioned now is because some of them may have escaped your attention, which must have been fully occupied up to this time in reviewing the evidence in the case. They are matters which, along with other and perhaps more obvious ones, remind us how desirable it is that you unanimously agree upon a verdict.

As stated in the instructions given at the time the case was submitted to you for decision, you should not surrender your honest convictions as to the weight or effect of evidence, solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

However, it is your duty as jurors to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence in the case with your fellow jurors. And in the course of your deliberations, you should not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous.

In order to bring twelve minds to an unanimous result, you must examine the questions submitted to you with candor and frankness, and with proper deference to and regard for the opinions of each other. That is to say, in conferring together, each of you should pay due attention and respect to the views of the others, and listen to each other's arguments with a disposition to reexamine your own views.

If much the greater number of you are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it makes no effective impression upon the minds of so many equally honest, equally conscientious fellow jurors, who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth. On the other hand, if a majority or even a lesser number of you are for acquittal, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment, which is not concurred in by many of their fellow jurors, and whether they should not distrust the weight and sufficiency of evidence,

which fails to convince the minds of several of their fellows beyond a reasonable doubt.

You are not partisans. You are judges--judges of the facts. Your sole interest here is to seek the truth from the evidence in the case. You are the exclusive judges of the credibility of all the witnesses, and of the weight and effect of all the evidence. In the performance of this high duty, you are at liberty to disregard all comments of both court and counsel, including of course the remarks I am now making.

Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience. Remember too, if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of "NOT GUILTY".

In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is on the government.

Above all, keep constantly in mind that, unless your final conscientious appraisal of the evidence in the case clearly requires it, the accused should never be exposed to the risk of having to run twice the gauntlet of a criminal prosecution; and to endure a second time the mental, emotional and financial strain of a criminal trial.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in the case bearing upon the questions before you.

You may be as leisurely in your deliberations as the occasion may require; and you shall take all the time which you may feel is necessary. (The bailiffs have been instructed to take you to your meals at your pleasure, and to take you to your hotel whenever you may be ready to go.)

You may now retire and continue your deliberations, in such manner as shall be determined by your good and conscientious judgment as reasonable men and women."

In United States v. Nickerson, 606 F.2d 156, 158-159 (6th Cir.), cert. denied, 444 U.S. 994 (1979), the Sixth Circuit concluded that an instruction similar to Devitt and Blackmar Instruction 18.15 was not coercive. See also United States v. Lewis, supra, 651 F.2d at 1165 (characterizing Devitt and Blackmar Instruction 18.15 as having been "approved" in Nickerson). Instruction 18.15 is a milder and shorter version of the Allen charge. It states:

> "I am going to ask you that you resume your deliberations in an attempt to return a verdict.
>
> As I have told you, each of you must agree in order to return a verdict. You have the duty to consult with one another and to deliberate with a view to reaching an agreement, if this can be done without violence to individual judgment. Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors. During the course of your deliberations, each of you should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous. No juror, however, should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict."

Four of the five circuits that have drafted pattern instructions include an instruction on the jurors' duty to deliberate to be given as part of the court's final instructions before deliberations begin. See Fifth Circuit Instruction 1.25, Seventh Circuit Instruction 7.06, Ninth Circuit Instruction 7.01 and Eleventh Circuit Basic Instruction 11. And the Committee Comments to Eighth Circuit Instruction 10.02 state that "it is preferable that an 'Allen' type instruction be given as part of the regular final instructions, before the jurors begin their deliberations." All other sources surveyed, except for the D.C. Bar, also include such an instruction. See Federal Judicial Center

Instruction 10, Devitt and Blackmar Instruction 18.01, Saltzburg and Perlman Instruction 3.67, and Sand and Siffert Instruction 9-7.

The instructions recommended by the Fifth, Seventh, Ninth and Eleventh Circuits, as well as those recommended by the Federal Judicial Center and Devitt and Blackmar, are all based to varying extents on the instruction recommended by the Commentary to ABA Standards for Criminal Justice, Trial by Jury Standard 15-4.4, which states:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges--judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

Instruction 8.04 attempts to incorporate the best parts of these various instructions in plain English form.

The "every reasonable effort" language in paragraph (1) comes from Seventh Circuit Instruction 7.06, and is essentially a plain English restatement of the language in other instructions that the jurors have a duty to deliberate with a view to reaching an agreement if they can do so without violence to individual judgment.

The "keep an open mind" language in paragraph (1) is patterned after the "open mind" language found in Seventh Circuit Instruction 7.06.

The "try your best" language at the end of paragraph (1) summarizes the "every reasonable effort" theme stated in the first sentence for emphasis.

The "do not ever change your mind" language at the beginning of paragraph (2) is a plain English restatement of the "do not surrender" language found in other instructions. The adverb "ever" was included to provide an appropriate balance to the "do not hesitate" language and the other strong language in the first paragraph encouraging jurors to reach agreement.

The "just because other jurors see things differently" language, and the "just to get it over with language," in paragraph (2) is a plain English restatement of language in other instructions. See Eleventh Circuit Basic Instruction 11 and Federal Judicial Center Instruction 10.

The "your own vote" language in paragraph (2) is a plain English restatement of the language in other instructions that the verdict must represent the considered judgment of each juror. The "only if you can do so honestly and in good conscience" language is drawn from the 1985 version of Ninth Circuit Instruction 7.01.

Paragraph (3) tells the jurors that no one will be allowed to hear their deliberations and that no record will be made of what they say. It is based on concepts included in Eleventh Circuit Basic Instruction 11 and Federal Judicial Center Instruction 9.

Paragraph (4) summarizes the deliberation process and relates it to the government's burden of proof. This approach is consistent with

the concluding sentences recommended by Seventh Circuit Instruction 7.06 and Federal Judicial Center Instruction 10. It rejects the "seek the truth" language found in other instructions for the reasons more fully explained in the Committee Commentary to Instruction 1.02. Such language incorrectly assumes that the "truth" is somewhere in the evidence presented, overlooks the possibility that the proofs do not satisfactorily establish the truth one way or the other, and thereby shifts attention away from the government's obligation to convince the jury beyond a reasonable doubt. But see United States v. LaRiche, supra, 549 F.2d at 1093 (rejecting the defendant's argument that such language distorts the jury's function and dilutes the government's burden of proof).

8.05

Punishment

(1) If you decide that the government has proved the defendant guilty, then it will be my job to decide what the appropriate punishment should be.

(2) Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

(3) Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

COMMITTEE COMMENTARY 8.05

It is standard practice to include an instruction telling the jurors that if they find the defendant guilty, it is the judge's job to determine the appropriate punishment, and that they cannot consider what the possible punishment might be in deciding their verdict. See Fifth Circuit Instruction 1.21, Eighth Circuit Instruction 3.12, Ninth Circuit Instruction 7.03, Eleventh Circuit Basic Instruction 10.1, Federal Judicial Center Instruction 4, D.C. Bar Instruction 2.71, Devitt and Blackmar Instruction 18.02, Saltzburg and Perlman Instruction 3.61 and Sand and Siffert Instruction 9-1.

The language used in paragraph (2) of this instruction is patterened after Eleventh Circuit Basic Instruction 10.1, which states that "the question of punishment should never be considered by the jury in any way in deciding the case." See also the 1983 version of Fifth Circuit Basic Instruction 10A ("the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused").

8.06

Verdict Form

(1) I have prepared a verdict form that you should use to record your verdict. The form reads as follows: _____.

(2) If you decide that the government has proved the charge against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved the charge against him beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it, and return it to me.

USE NOTE: The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

COMMITTEE COMMENTARY 8.06

Most of the circuits that have drafted pattern instructions have included an explanation to the jurors about how to use the verdict form, either as part of a general instruction on deliberations or as a separate instruction. See Fifth Circuit Instruction 1.25, Seventh Circuit Instruction 7.01, Eighth Circuit Instruction 3.12, Ninth Circuit Instruction 7.04 and Eleventh Circuit Basic Instruction 12. See also Federal Judicial Center Instruction 58, Devitt and Blackmar Instruction 18.03 and Saltzburg and Perlman Instruction 3.68.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" when this approach is preferred. See Federal Judicial Center Instruction 58.

In United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir.), cert. denied, ____ U.S. ____, 110 S.Ct. 1792, 108 L.Ed.2d 793 (1990), the Sixth Circuit cautioned against the use of special interrogatories in criminal cases, unless exceptional circumstances are present.

Special interrogatories are proper when a drug conspiracy has two objects, such as the distribution of marijuana and cocaine, and the sentencing ranges vary depending on the object offense. United States v Todd, 920 F.2d 399, 407-408 (6th Cir. 1990). Similarly, courts have required the use of special interrogatories when a defendant's conviction rests on counts charging the violation of multiple statutes, each with different maximum sentences. Id. But special interrogatories are not required when the amount of drugs is disputed, even though the sentence may vary depending on the amount possessed,

because the amount of drugs is not an element of the offense. Id. Accord United States v. Rey, 923 F.2d 1217, 1223 (6th Cir. 1991).

8.07

Lesser Offense

Order of Deliberations

Verdict Form

(1) As I explained to you earlier, the charge of _____ includes the lesser charge of _____.

(2) If you find the defendant not guilty of _____ [or if after making every reasonable effort to reach a unanimous verdict on that charge, you find that you cannot agree], then you must go on to consider whether the government has proved the lesser charge of _____.

(3) If you decide that the government has proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the verdict form. If you decide that the government has not proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the

form. Your foreperson [Each of you] should then sign the form, put the date on it and return it to me.

USE NOTE: The bracketed language in paragraph (2) should be added if the court believes that the jurors should be permitted to consider a lesser offense even though they have not unanimously acquitted the defendant of the charged offense.

The bracketed language in the last sentence of paragraph (3) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

COMMITTEE COMMENTARY 8.07

All of the circuits that have drafted pattern instructions at some point explain to the jury the order and manner in which greater and lesser offenses should be considered. See Fifth Circuit Instruction 1.32, Seventh Circuit Instructions 2.03 and 7.02, Eighth Circuit Instruction 3.10, Ninth Circuit Instruction 3.13 and Eleventh Circuit Special Instruction 5. All of the other sources surveyed also include such an explanation somewhere in the instructions. See Federal Judicial Center Instruction 48, D.C. Bar Instruction 4.00, Devitt and Blackmar Instruction 18.05, Saltzburg and Perlman Instruction 3.64 and Sand and Siffert Instruction 9-10.

Although there is uniform agreement that some explanation about this should be given, there is a substantial variation of opinion about what the instruction should say. The Eleventh Circuit, along with Devitt and Blackmar, Saltzburg and Perlman and the D.C. Bar, take the position that the jury should not move on to consider a lesser included offense until the jury first unanimously agrees that the defendant is not guilty of the greater offense. The Fifth and Eighth Circuits, and the Federal Judicial Center, take the position that the jury should be allowed to move on to consider a lesser offense if the jury is unable to unanimously agree on a verdict on the greater offense. The Seventh Circuit and Sand and Siffert take the position that neither of these two options is legally incorrect, and that the district court may choose between them as the court sees fit, unless the defendant objects, in which case the court should give whichever option the defendant elects. The Ninth Circuit includes both options, and by case decision agrees that the defendant should have the right to elect

whichever option he prefers. See United States v. Jackson, 726 F.2d 1466, 1469-1470 (9th Cir. 1984).

Giving the defendant the right to elect the option to be given is based on the Second Circuit's decision in United States v. Tsanas, 572 F.2d 340 (2nd Cir.), cert. denied, 435 U.S. 995 (1978). In his opinion for the Court in Tsanas, Judge Friendly explained that the two available options had advantages and disadvantages for both the prosecution and the defense. With regard to the option that requires the jury to unanimously find the defendant not guilty of the greater offense before moving on to consider a lesser offense, he first described its advantages:

> "[This] instruction...has the merit, from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one. From the defendant's standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree[7].

> [7]It might be thought to have the further advantage of producing a clear acquittal on the greater charge which would plainly forbid reprosecution on that charge after a successful appeal from the conviction on the lesser charge. But, here again, such a reprosecution apparently is barred by the double jeopardy clause regardless of the form of instruction. See Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d. 199 (1957); Price v Georgia, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970)." Tsanas, supra at 346.

He then went on to describe the disadvantages of such an instruction:

> "But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury

> can move to the lesser,it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant. If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge." Id. at 346.

With regard to the option that allows the jury to move on to consider a lesser offense if the jury is unable to unanimously agree on a verdict on the greater offense, Judge Friendly said:

> "An instruction permitting the jury to move on to the lesser offense if after all reasonable efforts it is unable to reach a verdict on the greater likewise has advantages and disadvantages to both sides--the mirror images of those associated with the [option discussed above]. It facilitates the Government's chances of getting a conviction for something, although at the risk of not getting the one that it prefers. And it relieves the defendant of being convicted on the greater charge just because the jury wishes to avoid a mistrial, but at the risk of a conviction on the lesser charge which might not have occurred if the jury, by being unable to agree to acquit on the greater, had never been able to reach the lesser." Id. at 346.

He then concluded as follows:

> "With the opposing considerations thus balanced, we cannot say that either form of instruction is wrong as a matter of law. The court may give the one that it prefers if the defendant expresses no choice. If he does, the court should give the form of instruction which the defendant seasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under the less rigorous instruction is his readier conviction for a lesser rather than a greater crime. As was said in Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 622, 99 L. Ed. 905 (1955), albeit in a different context:
>
> It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of

> a penal code against the imposition of a harsher punishment." Id. at 346.

In United States v. Jackson, supra, 726 F.2d at 1469-1470, the Ninth Circuit found this reasoning persuasive, and joined the Second Circuit in holding that the district court should give whichever option the defendant elects. In addition to the reasons advanced by Judge Friendly, the Ninth Circuit argued that this approach "ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard." The Ninth Circuit explained that if the jury must unanimously agree on a not guilty verdict on the greater offense before moving on to a lesser, there is a risk that jurors who have a doubt that the defendant is guilty of the greater offense, but who are convinced the defendant is guilty of some offense, will likely resolve their doubts in favor of convicting the defendant of the greater offense, rather than holding out and not convicting the defendant of anything at all. See also Catches v. United States, 582 F.2d 453, 459 (8th Cir. 1978) (referring to Judge Friendly's opinion in Tsanas as a "well-reasoned rule").

The closest that the Sixth Circuit has come to ruling on this question was in United States v. Cardinal, 782 F.2d 34 (6th Cir.), cert. denied, 476 U.S. 1161 (1986). In Cardinal, the district court gave Devitt and Blackmar Instruction 18.05, which states that if the jury unanimously finds the defendant not guilty of the greater offense, it must proceed to consider the lesser offense. On appeal the defendant contended that the jury should have been told to consider the lesser offense if, after consideration of the greater, they had "some reasonable doubt" as to guilt of the greater offense. The Sixth Circuit held that the defendant had not properly preserved this issue

for review, and held that the instruction given was clearly not plain error under Fed. R. Crim. Pro. 52(b). Cardinal, supra at 36-37. The Sixth Circuit did not cite or discuss the Second Circuit's decision in Tsanas, and distinguished the Ninth Circuit's decision in Jackson on the ground that there the defendant had made a timely request.

In Cardinal, the Sixth Circuit noted in the course of its opinion that in Catches v. United States, supra, 582 F.2d at 459, the Eighth Circuit had held that the rejection of such a request by the defense is not an error of constitutional magnitude. But see Spierings v. Alaska, 479 U.S. 1021, 107 S. Ct. 679, 93 L. Ed. 2d 729 (1986) (White, J. dissenting to denial of certiorari). In Spierings, the Alaska Supreme Court rejected the defendant's argument that the trial court erred by instructing the jurors that they could not render a verdict on a lesser included offense until they unanimously acquitted him of the greater offense. Justice White noted that the Alaska Supreme Court's decision conflicted with Tsanas and Jackson, and urged the Supreme Court to grant certiorari to resolve this conflict.

In the absence of controlling authority from the Supreme Court or the Sixth Circuit, the Committee has included bracketed language in paragraph (2) to be used in the discretion of the district court. This bracketed language incorporates the concept that the jurors may move on to consider a lesser offense even if they cannot unanimously agree on a verdict on the greater charge. If the district court believes that this concept is appropriate, this bracketed language should be added to the unbracketed language used in paragraph (2). If the court believes that this concept is not appropriate, the bracketed language should be omitted. The Committee takes no position on which approach should be used.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence should be used instead of "Your foreperson" when this approach is preferred. See Federal Judicial Center Instruction 58.

See generally Annotation, Propriety of Lesser-Included-Offense Charge to Jury in Federal Criminal Cases, 100 A.L.R. Fed. 481 (1990).

8.08

Verdict Limited to Charges Against This Defendant

(1) Remember that the defendant is only on trial for the particular crime charged in the indictment [and the lesser charges which I described]. Your job is limited to deciding whether the government has proved the crime charged [or one of those lesser charges].

[(2) Also remember that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved this defendant guilty. Do not let the possible guilt of others influence your decision in any way.]

USE NOTE: Any changes made in paragraphs (1) and (2) should be made in paragraphs (2) and (3) of Instruction 2.01 as well.

Bracketed paragraph (2) should be included if the possible guilt of others has been raised as an issue during the trial. Modifications of this paragraph may be necessary in conspiracy, aiding and abetting, alibi or mistaken identification cases, where the possible guilt of others may be a legitimate issue.

COMMITTEE COMMENTARY 8.08

The purpose of this instruction is twofold. First, to remind the jurors that their verdict is limited to the particular charge made against the defendant. And second, to remind them that their verdict is limited to the particular defendant who has been charged. It is a plain English restatement of various concepts found in comparable instructions. See Fifth Circuit Instruction 1.20, Ninth Circuit Instruction 3.12, Eleventh Circuit Basic Instruction 10.1, Federal Judicial Center Instruction 20, Devitt and Blackmar Instructions 11.04 and 11.06, and Sand and Siffert Instructions 2-18 and 3-3.

Paragraph (2) should not be given in every case. If the possible guilt of others has not been raised during trial, this paragraph is unnecessary and should be omitted to avoid confusion. Note also that this paragraph may require modification in cases where vicarious criminal liability is alleged, such as conspiracy or aiding and abetting cases. In such cases the jury may be required to decide the guilt of other persons not charged in the indictment. Paragraph (2) may also require modification in cases in which the defendant has raised an alibi defense or has argued mistaken identification. Where the defendant claims that someone else committed crime, it may be confusing to instruct the jurors that they should not be concerned with anyone else's guilt.

The concepts covered in paragraphs (1) and (2) are also covered in Instruction 2.01. Corresponding deletions or modifications should be made there as well.

8.09

Court Has No Opinion

(1) Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt.

COMMITTEE COMMENTARY 8.09

This instruction is designed to remind the jurors that nothing the judge has said or done should be taken as an expression of an opinion about how the case should be decided. Both the Ninth Circuit and Devitt and Blackmar include such a reminder in their instructions. See Ninth Circuit Instruction 7.02 and Devitt and Blackmar Instruction 18.10.

Chapter 9.00

Supplemental Instructions

9.01

Supplemental Instructions in Response to Juror Questions

(1) Members of the jury, I have received a note from you that says _____.

(2) Let me respond by instructing you as follows: _____.

(3) Keep in mind that you should consider what I have just said together with all the other instructions that I gave you earlier. All these instructions are important, and you should consider them together as a whole.

(4) I would ask that you now return to the jury room and resume your deliberations.

USE NOTE: This instruction should be used when the court gives supplemental instructions in response to juror questions.

COMMITTEE COMMENTARY 9.01

This instruction is patterned after Devitt and Blackmar Instruction 18.13. It is designed to provide a standardized response to juror questions which includes a reminder that all the instructions should be considered together as a whole.

For a summary of when supplemental instructions should be given, see United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989). See also United States v. Brown, 915 F.2d 219, 223 (6th Cir. 1990).

9.02

Rereading of Testimony

(1) Members of the jury, my court reporter will now read _____'s testimony.

(2) Keep in mind that you should consider this testimony together with all the other evidence. Do not consider it by itself, out of context. Consider all the evidence together as a whole.

USE NOTE: This instruction should be used when testimony is reread to the jury.

COMMITTEE COMMENTARY 9.02

The purpose of this instruction is to caution the jury not to give undue emphasis to selected testimony. See generally United States v. Osterbrock, 891 F.2d 1216, 1219 (6th Cir. 1989) (affirming defendant's conviction in part on the ground that a similar cautionary instruction was given). See also Instruction 9.01, which cautions the jury not to give undue emphasis to selected instructions.

The decision whether selected testimony should be reread to the jury at all is left to the trial court's sound discretion. E.g., United States v. Thomas, 875 F.2d 559, 562 (6th Cir.), cert. denied, ____ U.S. ____, 110 S.Ct. 189, 107 L.Ed.2d 144 (1989).

9.03

Partial Verdicts

(1) Members of the jury, you do not have to reach unanimous agreement on all the charges before returning a verdict on some of them. If you have reached unanimous agreement on some of the charges, you may return a verdict on those charges, and then continue deliberating on the others. You do not have to do this, but you can if you wish.

(2) If you do choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on.

(3) Your other option is to wait until the end of your deliberations, and return all your verdicts then. The choice is yours.

(4) I would ask that you now return to the jury room and resume your deliberation.

USE NOTE: This instruction should be used if the jurors ask about, attempt to return or otherwise indicate that they may have reached a partial verdict. It may also be appropriate if the jury has deliberated for an extensive period of time.

COMMITTEE COMMENTARY 9.03

Fed. R. Crim. P. 31(b) states that at any time during the deliberations in a multi-defendant case, the jury "may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed." In a series of cases, other circuits have recognized that partial verdicts may be accepted not only as to less than all defendants, but also as to less than all counts. E.g., United States v. Levasseur, 816 F.2d 37, 45 (2nd Cir. 1987); United States v. Ross, 626 F.2d 77, 81 (9th Cir. 1980).

In United States v. DiLapi, 651 F.2d 140, 147 (2nd Cir. 1981), cert. denied, 455 U.S. 938 (1982), and United States v. Burke, 700 F.2d 70, 78-80 (2nd Cir.), cert. denied, 464 U.S. 816 (1983), the Second Circuit indicated that when the jury asks about or attempts to return a partial verdict, the district court should neutrally explain the jury's options of either returning the verdicts reached, or deferring any verdicts until the deliberations are concluded. Such an instruction should not encourage or discourage a partial verdict, and should advise the jury that any verdict it does return is not subject to later revision. See United States v. Hockridge, 573 F.2d 752, 756-760 (2nd Cir.) (once a partial verdict is returned, it may not later be impeached), cert. denied, 439 U.S. 821 (1978).

If a partial verdict is returned, the district court may require the jury to continue its deliberations on the remaining counts. United States v. DeLaughter, 453 F.2d 908, 910 (5th Cir.), cert. denied, 406 U.S. 932 (1972); United States v Barash, 412 F.2d 26, 32 (2nd Cir.), cert. denied, 396 U.S. 832 (1969).

None of the circuits that have drafted pattern instructions

include an instruction on partial verdicts. But all five of the other sources surveyed do in one form or another. See Federal Judicial Center Instruction 58, D.C. Bar Instruction 2.92, Devitt and Blackmar Instructions 18.08 and 18.16, Saltzburg and Perlman Instruction 3.68 and Sand and Siffert Instruction 9-8.

Two of these five (Federal Judicial Center Instruction 58 and Saltzburg and Perlman Instruction 3.68) include this subject in their general instruction on verdict forms which is given before the jury retires to deliberate. The other three include it in a special instruction to be given only after the jury has indicated that it wants to return a partial verdict, or after the jury has deliberated for an extensive period of time.

The Committee believes that the latter approach is preferable. Initially, at least, the jury should be encouraged to try and reach unanimous agreement on all counts.

Even if the jury has not specifically asked about or attempted to return a partial verdict, an instruction like this may be appropriate if the jury has deliberated for an extensive period of time. What consititutes an extensive period of time will depend on the nature and complexity of the particular case.

9.04

Deadlocked Jury

(1) Members of the jury, I am going to ask that you return to the jury room and deliberate further. I realize that you are having some difficulty reaching unanimous agreement, but that is not unusual. And sometimes after further discussion, jurors are able to work out their differences and agree.

(2) Please keep in mind how very important it is for you to reach unanimous agreement. If you cannot agree, and if this case is tried again, there is no reason to believe that any new evidence will be presented, or that the next twelve jurors will be any more conscientious and impartial than you are.

(3) Let me remind you that it is your duty as jurors to talk with each other about the case; to listen carefully and respectfully to each other's views; and to keep an open mind as you listen to what your fellow jurors have to say. And let me remind you that it is your duty to make every reasonable effort you can to reach unanimous agreement. Each of you, whether you are in the majority or the minority, ought to

seriously reconsider your position in light of the fact that other jurors, who are just as conscientious and impartial as you are, have come to a different conclusion.

(4) Those of you who believe that the government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the government has not proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt. None of you should hesitate to change your mind if, after reconsidering things, you are convinced that other jurors are right and that your original position was wrong.

(5) But remember this. Do not ever change your mind just because other jurors see things differently, or just to get the case over with. As I told you before, in the end, your vote must be exactly that--your own vote. As important as it is for you to reach unanimous agreement, it is just as important that you do so honestly and in good conscience.

(6) What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.

(7) I would ask that you now return to the jury room and resume your deliberations.

USE NOTE: This instruction is designed for use when the court concludes that the jury has reached an impasse and that an Allen charge is appropriate.

A stronger, more explicit reminder regarding the government's burden of proof than the implicit one contained in paragraph (4) may be appropriate in unusual cases.

COMMITTEE COMMENTARY 9.04

As its name implies, this instruction is designed for use when the court concludes that the jury has reached an impasse and that an Allen charge is appropriate. When such an instruction should be given is left to the trial court's sound discretion. E.g., United States v. Sawyers, 902 F.2d 1217, 1220 (6th Cir. 1990).

Instruction 9.04 is a modified version of the instruction approved by the United States Supreme Court in Allen v. United States, 164 U.S. 492, 501-502,17 S. Ct. 154, 41 L. Ed. 528 (1896). The Allen decision and its progeny are thoroughly analyzed in the Committee Commentary to Instruction 8.04.

Paragraph (1) is patterned after parts of the first paragraph of Fifth Circuit Instruction 1.41, Eleventh Circuit Trial Instruction 6 and the third paragraph of Sand and Siffert Instruction 9-11. It is an introductory, transitional paragraph designed to advise the jurors in a non-threatening way that further deliberations will be required.

Paragraph (2) is a plain English restatement of certain concepts found in Fifth Circuit Instruction 1.41, Eleventh Circuit Trial Instruction 6, D.C. Bar Instruction 2.91 (Alternative B) and Devitt and Blackmar Instruction 18.14. It emphasizes the importance of trying to reach unanimous agreement, and explains that no subsequent jury is likely to be in any better position to decide the case. It does not explicitly include any admonition about the burden and expense of trial. Although such language does not necessarily constitute reversible error in the Sixth Circuit, see United States v. Giacalone, 588 F.2d 1158, 1167 (6th Cir. 1978) (not reversible error, at least in the absence of any specific objection), cert. denied, 441 U.S. 944

(1979), it has been criticized as a "questionable extension" of Allen. See United States v. Harris, 391 F.2d 348, 354 (6th Cir.), cert. denied, 393 U.S. 874 (1968).

Paragraph (3) reminds the jurors of their duty to consult with each other, using the same language used in Instruction 8.04.

Paragraph (4) admonishes all the jurors, whether they are in the majority or the minority, to reconsider their position in light of the contrary position taken by other jurors, and concludes by telling the jurors that they should not hesitate to change their minds if they decide that their original position should be abandoned.

Admonishing the majority to reconsider their position represents a significant departure from the instructions approved by the Supreme Court in Allen. The instructions in Allen focused exclusively on the jurors who were in the minority, and directed them to reconsider their position in light of the fact that the majority had come to a different conclusion. Although the Supreme Court recently reaffirmed the continuing validity of Allen in Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), the Court noted that there is even less doubt about the validity of Allen charges that omit the language focusing exclusively on minority jurors. Id. at 238.

Focusing exclusively on the minority jurors has been criticized by the American Bar Association Standards for Criminal Justice, Trial by Jury Standard 15-4.4, Commentary at page 15-140, as unduly coercive of minority jurors. See also Williams v. Parke, 741 F.2d 847, 850 (6th Cir. 1984) ("A major criticism of the Allen charge focuses on 'its potentially coercive effect on minority jurors'."), cert. denied, 470 U.S. 1029 (1985). Such language has been omitted entirely from the pattern instructions promulgated by the Seventh and Ninth Circuits and

the Federal Judicial Center. The Fifth and Eleventh Circuits retain this language, although in slightly modified form. See Fifth Circuit Instruction 1.41 and Eleventh Circuit Trial Instruction 6.

The language in paragraph (4) admonishing all the jurors to reconsider their position is a plain English restatement of language found in D.C. Bar Instruction 2.91 (Alternative B). Although it does not go as far as Allen would allow, it still encourages jurors to reconsider their positions in light of the fact that other jurors disagree, and does so in a more evenhanded way that should be much less susceptible to successful appellate attack. It is based on the philosophy that the purpose of a supplemental charge should not be to coerce minority jurors into joining the majority. Instead, such a charge should be aimed at breaking down the barriers to communication that have developed and rekindling reasoned discussion.

Paragraph (5) is a plain English restatement of the required admonition that jurors should never surrender a conscientious belief merely for the purpose of reaching agreement. See for example United States v. Scott, 547 F.2d 334, 337 (6th Cir. 1977) (referring to this admonition as "one of the most important parts of the Allen charge"). The language used is patterned after the language used in Instruction 8.04.

Some Allen charges include language telling the jurors that if, after further deliberation, they cannot conscientiously agree, the court will discharge them. See Hyde v. United States, 225 U.S. 347, 383, 32 S. Ct. 793, 56 L. Ed. 1114 (1912), and United States v. Barnhill, 305 F.2d 164, 165 (6th Cir.), cert. denied, 371 U.S. 865 (1962). See also Williams v. Parke, supra, 741 F.2d at 850 (trial court's instructions implicitly advised jurors of their right to

continue disagreeing by alluding to the possibility that a new jury might be necessary, and by telling them to return to court if they could not agree). The Committee believes that such language is not necessary given the other language in the instruction minimizing its coercive effect. See also United States v. Arpan, 887 F.2d 873, 876 (8th Cir. 1989) (specific instruction on "hung jury" alternative is not required where the district court's original instructions advised the jurors that they should try to reach agreement if they could do so without violence to individual judgment, and that they should not surrender their honest convictions for the mere purpose of returning a verdict).

Paragraph (6) is patterned after language included in Fifth Circuit Instruction 1.41 and Eleventh Circuit Trial Instruction 6. It is designed to blunt the potential coercive effect of a supplemental charge by explicitly telling the jurors that they should take as much time as they need, and that nothing said by the court in the supplemental charge was meant to try and rush or pressure them into reaching a verdict. As indicated by the Sixth Circuit in United States v. Markey, 693 F.2d 594, 597 (6th Cir. 1982), supplemental instructions should convey the impression that it is more important to be thoughtful than it is to be quick.

A strong argument can be made that a supplemental charge should explicitly remind the jurors that the government bears the burden of proof in a criminal case, and that if the government has failed to prove guilt beyond a reasonable doubt, then the defendant is entitled to a not guilty verdict. These concepts were included in the seminal version of the Allen charge. See Pugliano v. United States, 348 F.2d 902, 903-904 (1st Cir.), cert. denied, 382 U.S. 939 (1965), discussing

Commonwealth v. Tuey, 62 Mass. (8 Cush) 1, 2-3 (1851). Sixth Circuit cases have said that such a reminder "may be desirable," United States v. LaRiche, 549 F.2d 1088, 1093 (6th Cir.), cert. denied, 430 U.S. 987 (1977), or even required under particular circumstances. See United States v. Lewis, 651 F.2d 1163, 1165 (6th Cir. 1981)(given the weakness of the evidence against the defendant and the jury's difficulty in weighing the evidence, it was improper not to reinstruct on the government's burden of proving guilt beyond a reasonable doubt). Fifth Circuit Instruction 1.41, Eleventh Circuit Trial Instruction 6 and Devitt and Blackmar Instruction 18.14 all include an explicit reminder regarding these concepts.

The Committee rejected this approach in favor of an implicit reminder in paragraph (4). Language in that paragraph directs those jurors who believe that the government has proved the defendant guilty beyond a reasonable doubt to stop and ask themselves if the evidence is sufficiently convincing in light of the fact that other jurors are not convinced. Other language then directs those jurors who believe that the government has not proved the defendant guilty beyond a reasonable doubt to stop and ask themselves if their doubt is a reasonable one in light of the fact that other jurors do not share their doubt. This language works the reasonable doubt concept into the instruction in a neutral and evenhanded way that does not tip the scales towards a not guilty verdict. While an explicit reminder that is slanted toward a not guilty verdict may be appropriate in unusual cases, or in supplemental instructions like Fifth Circuit Instruction 1.41, Eleventh Circuit Trial Instruction 6, or Devitt and Blackmar Instruction 18.14, all of which single out and focus exclusively on minority jurors, such a reminder would upset the balanced nature of this instruction, which

directs all the jurors to reconsider their views.

The Sixth Circuit has strongly condemned language that tells jurors the case must be "decided" at some time by some jury, on the ground that such language is coercive and misleading because it precludes the right of a defendant to rely on the possibility of continuing juror disagreement. United States v. Harris, supra, 391 F.2d at 355. In contrast, the Sixth Circuit has said that there is a clear distinction between language stating that the case must be "decided" and language stating that the case must be "disposed" of. Id. at 356. The latter "merely restates the obvious proposition that all cases must come to an end at some point, whether by verdict or otherwise." United States v. LaRiche, supra, 549 F.2d at 1092.

While this distinction may be clear to lawyers, lay jurors are unlikely to grasp or understand it without further explanation. For this reason, the proposed instruction omits any such language. It should be noted, however, that paragraph (2) emphasizes the related concept that no subsequent jury is likely to be in any better position to decide the case.

9.05

Questionable Unanimity After Polling

(1) It appears from the poll we just took that your verdict may not be unanimous. So I am going to ask that you return to the jury room.

(2) If you are unanimous, tell the jury officer that you want to return to the courtroom, and we will poll you again. If you are not unanimous, please resume your deliberations. Talk to each other, and make every reasonable effort you can to reach unanimous agreement, if you can do so honestly and in good conscience.

USE NOTE: This instruction should be used when a poll of the jury indicates that a proffered verdict may not be unanimous.

Depending on the circumstances, the court may wish to expand on the concepts contained in the last sentence of paragraph (2).

COMMITTEE COMMENTARY 9.05

Most of the sources surveyed include an instruction to be used when a poll of the jury indicates that a proffered verdict may not be unanimous. See Seventh Circuit Instruction 7.07, Eighth Circuit Instruction 10.03, Ninth Circuit Instruction 7.06, Federal Judicial Center Instruction 59, D.C. Bar Instruction 2.93, Devitt and Blackmar Instruction 18.17, Saltzburg and Perlman Instruction 3.70 and Sand and Siffert Instruction 9-12.

This instruction is patterned after Saltzburg and Perlman Instruction 3.70 and Federal Judicial Center Instruction 59. Depending on the circumstances, the district court may wish to expand on the last sentence which briefly summarizes the concepts contained in Instructions 8.04 and 9.04.